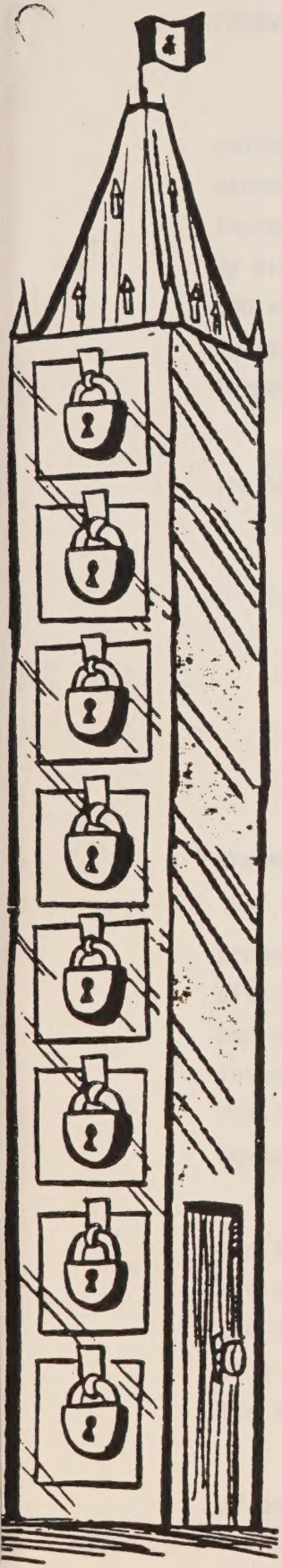

SUGGESTED CHANGES

to Canada's 1982 Access to Information Act ©

by

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Spring, 1986

FOREWORD

The Canadian Government has a two-track access to information policy - it teases us with openness but at the same time promotes secrecy. This report deals with the changes that are needed to improve Canada's 1982 Access to Information Act. It is based on my experiences as a frequent Access Act user, for I have filed nearly 300 requests and 41 complaints and have been involved in 8 Federal Court cases. The report was prepared to coincide with the upcoming three-year Parliamentary review of the Access Act.

The report focuses on several ways of improving the Access Act, including:

- improving access rule making and operations
- resolving time delays
- preventing excessive fees
- restricting exemptions
- including cabinet confidences and many ministerial records
- developing user-oriented complaint procedures
- extending the principle of openness in government.

My previous reports on access legislation have provided background to these and other areas of concern about Canada's Access Act. *

For the past decade, I have been involved in monitoring and promoting open government and access to information as a spirited citizen, a member of public interest groups, an independent researcher, and as a consultant to media, labour, research, political, public interest and civil liberties groups. Many of the requests I have filed under the Access Act were done in my capacity as a citizen advocate; in some cases I have filed requests for groups.

Since 1975 I have appeared before several Parliamentary committees dealing with freedom of information and I have spoken at various local, national and international forums on access legislation. For the last two decades, I have also been involved in, and have reported on, a wide range of public policy issues. These have made me appreciate the need for less government secrecy.

The time has come to improve the Access Act as an instrument of open government.

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* Appendix One lists the access reports that are presently available as well as those that are in progress.

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SUMMARY

As an independent consumer researcher monitoring and using Canada's 1982 Access to Information Act, I have written previously about the limitations of the Act.

Recommendations

This report focuses on the procedural and legal changes that are needed to improve access to information in Canada. The changes suggested here are meant to turn the Access Act into a tool that can be used to help people gain access to as many government records as possible, and in a relatively quick and inexpensive manner.

The 14 proposals discussed in considerable detail in the report are as follows:

- Extend the provisions of the Access Act so that it applies to all federal agencies and can be used by any person or group
- Extend the purpose of the Act to include the active provision of government assistance to information seekers
- Limit time delays by providing for a 15 day response period instead of a 30 day period, with no extensions beyond 60 days, coupled with penalties for slower responses
- Reduce the cost of the fees that are charged to users of the Act, and enable a greater opportunity for fee waiver consideration
- Establish the means via an Access to Information Centre for more publicity about the Act, for greater public input into access rule making, and for more careful reporting of departmental information release policies

- Tighten the exemptions that are possible via injury tests, time restrictions and a strong public interest override provision
- Restrict the exemptions that are possible for cabinet confidences and ministerial records, and subject these records to judicial review
- Correct the abuses that are possible by officials who make unjustifiably broad claims for commercial, law enforcement, policy advice, cabinet confidentiality, and other forms of exemption
- Establish a residual balancing test to handle the competing pressures for access to personal information and protection of that information
- Revitalize the Information Commission so that it operates under publicly known procedures, and functions as a user's advocacy office, rather than a narrow legalistic bureau
- Promote independent trial de novo review in all cases of information denial and encourage procedures to give access users greater access to the Federal Court
- Penalize public officials and agencies for wrongfully withholding government information
- Permit access users to sue for damages caused when public officials wrongfully withhold government information
- Add other features to the Act to permit greater openness in government, including provisions for open regulatory meetings, measures to protect public employees who release information in the public interest, and requirements for an oath of service for public employees and a progressive policy for public employees to follow when they communicate with the public.

These measures together, amount to a bold prescription for change. It is hoped that their implementation would take what is currently a rather self-serving, limited piece of legislation, and

turn it into a truly workable, beneficial information release law. This change is necessary because access users experience serious difficulties and frustration due to the long administrative delays, extensive fee barriers and excessive claims to confidentiality that are presently permitted under the Act.

Changes: Problematic or Opportune?

Parliamentarians quite rightly will want to know what such changes mean in terms of:

- costs to government
- the balance between the public's right to know and legitimate secrecy
- the degree of government involvement in promoting, regulating, reviewing, and enforcing access policies.

Costs to Government

The fear is often raised that providing quicker access and greater fee waivers to users will burden government operations and end up being too costly.

Existing Access Act operations are not very expensive when compared to many government programs or other information programs nor will my proposals add substantially to these costs. *

The amount of money that is collected in fees from users is not a very substantial proportion of these costs but, if anything, the policy of charging fees has helped to discourage use of the Act. This author contends that the fee practices of many departments under the Act are not reasonable.

User pay programs certainly have their place but, in order to be reasonable and just, they must provide competitive rates and refrain from singling out one special type of government information service such as the Access Act for charges.

* Annual federal information expenses alone have been estimated to be at least ten billion dollars, and this is a significant portion of the over 100 billion in federal expenditures. The costs of the Access Act are estimated at being over 3 million a year.

There are trade-offs in a country that strives for responsible and democratic government. The price we pay for democracy has an information cost to it. Indeed, the government spends a great deal of money to gather information these days. It seems quite unfair on political and economic grounds to generate information on behalf of citizens and then to deny citizens open access to that information. This is a counter-productive policy for a democracy to take.

Openness Versus Secrecy

The government appears to have an obsession that some sensitive, confidential information may be released inadvertently under the Act. This concern has prompted officials to establish broadly worded exemptions and to act as if they were above providing information and serving the public.

Certainly, many Access Act users have complained about the difficulties of gaining access to information. Even some of the study teams of the Nielsen Task Force found it difficult to obtain information during their review of government programs. On several occasions, this author has gained access to material which was previously classified as exempt, and has wondered why it was kept secret in the first place. There are of course certain security and law enforcement situations where evidence of injury to Canadian or international affairs may justify a call for confidentiality. But, far too often, exemptions are applied under the Act without good reason.

The practice of setting up certain cabinet and ministerial records as above and beyond the Act also creates an unwarranted mystique and a credibility problem for the Act; many of these records are nothing more than mundane summaries. Further, the practices of creating more sanitized reports and preparing fewer written records are in violation of the spirit of the Access Act.

The Act itself states, in a paragraph on its purpose, that necessary exemptions are to be limited and made specific. The drafters and administrators of the Act, however, appear to have

paid little attention to this proviso. The end product has been over 500 ways to say no to Access Act applicants. The Act's spirit has been crushed by unreasonable exemptions and interpretations by several agencies to the point that "the public be damned" seems to be the main operating emphasis of the Act.

The Government's Role in Access Policies

The proposals in this report are intended to provide the means for promoting and enforcing greater openness in government. Measures such as an Access to Information Centre, a tougher Information Commission and a strengthened designated Parliamentary Committee on Access to Information may appear to be overly bureaucratic. And the proposal for penalizing public officials and agencies when they wrongfully withhold government information may appear to be too harsh or meaningless in such a huge institution as the federal government.

Yet, these proposals are defensible because they do not require much money to be implemented and they have the potential to make more citizens use the Act and to make the government more accountable for its growing information operations.

Many people who advocate either less or more government intervention forget that access to government records must exist regardless of the level of government services. It is important that the government properly coordinates its information expenditures and aims to disseminate useful information to the public. If the Access Act is meant to be a step in the right direction in terms of ensuring active information accountability and coordination, and providing public access to information about government operations, then any improvement in the Act should be welcomed.

The Access to Information Centre, like the Canadian Centre for Occupational Health and Safety, need not be another government agency. It could be a vibrant instrument created by Parliament but run by the voluntary sector to promote and monitor access practices.

An Information Commission with three Commissioners does not have to be viewed as creeping regulation; rather, it can be viewed as a type of mediation tribunal appointed by Parliament to help protect and enhance the public's right to know.

Finally, a permanent Parliamentary committee to review access legislation is already embedded in the legislation. A separate committee with permanent staff, however, must be established to respond to all kinds of access problems, and evaluate the access and secrecy provisions of legislative initiatives on an ongoing basis.

A Plea for Openness

The Access Act is subject to one of the first compulsory statutory reviews ever done in Canada. The Act will be renewed after this review. Yet, this author fears that it will surely wither away if the status quo is maintained and the Act continues to be characterized and reinforced by secrecy provisions and access barriers.

The establishment of a better, more user friendly Access Act requires a concerted effort to incorporate new provisions to encourage openness in government. Elected officials may choose to segregate into separate legislative enactments rather than incorporate into access legislation suggestions like a sunshine provision, to open the meetings of Ottawa's regulatory boards and commissions. The main thing is to promote measures that encourage the ordinary citizen to learn more about government activities and that show Parliament's commitment to a vibrant society.

Changes in the Access Act will only be as effective as the strength of the public will for a more participatory democracy. No one should expect encouraging results until changes are made in the government's secrecy policies. Vigorous lobbying towards that end is still required in the next crucial year of statutory review. After that, constant monitoring of government information operations will be essential. There are strong federal and provincial government pressures to retain and continue secrecy practices.

We cannot afford to lose sight of the many public needs and uses for an effective Access Act. The Act can provide the means for ending barriers to secrecy, providing consumer information and promoting better government. The Act can become a stimulii for improved provincial and local access legislation and be a model for other countries to consider adopting.

Copies of the report are available from Ken Rubin for $30.00 plus delivery costs, by writing Ken Rubin, 68 Second Avenue, Ottawa, Canada K1S 2H5.

PART I: PROBLEMS WITH ACCESS PROCEDURES, RULES AND OPERATIONS

I have spent much time and energy as a user of Canada's Access to Information Act protesting time delays, unnecessary fees and access rules that promote rigid practices in some departments. Several possible solutions to these problems are presented below.

CHAPTER I: TIMING DELAYS AND THEIR RESOLUTION

A. Background

The expression "information delayed is information denied" is of utmost relevance to many access users. Delayed receipt of information can often mean that an applicant ends up with information that is out of date and no longer useful. The existing Access Act does not clearly provide an enforceable right to a fast response in processing an applicant's request for information. In fact, it has been a fairly common practice for some federal departments to abuse the user's need for prompt replies by not releasing information for months or even years. A few examples illustrate this point well:

- A request for federal-provincial correspondence on social insurance number usage, initiated informally in November 1982 and formalized at Employment and Immigration's insistence in February 1984, still remains largely unanswered
- Employment and Immigration delayed access to a completed Privacy Commissioner report for over two weeks. The report was an interim audit of two exempt immigration banks and the delay was due to the fact that the department disagreed with the Commissioner's findings. If this user had not protested the unnecessary delay and contacted the Legal Counsel of the Privacy Commissioner, then Employment and Immigration might have delayed access to the report for the full legal 30 day period

. The Information Commissioner has still not issued findings related to a November 1983 complaint against the CRTC involving records on Bell Canada rate and re-organization matters

Time delay problems are usually attributable to the use of inexperienced personnel, poorly kept records and foot dragging. Also, they are caused by the permissive timetable provisions of the Access Act. The Act gives agencies a lengthy 30 day period to respond to applications (Section 7) as well as legal opportunities to extend the initial period.

The only formal recourse provided in the Act for applicants who face time delays is the procedure of complaining to the Information Commissioner. In practice, this method of recourse ends up causing a still further delay of several months, and if the Commissioner does find the complaint to be justified then the department gets away with a slight public reprimand in her Annual Report.

Those of us who believe that the time response of departments should be improved share at least seven concerns that Parliamentarians ought to take into account:

1. Timing is important to many users; a delayed response, for instance, can mean not having records for a story, publication, or regulatory hearing.

2. Access Act applications should be processed immediately unless a major deficiency exists in the application. Some departments have not been accepting applications because a cheque was not written correctly, or the applicant failed to mention he or she was a Canadian citizen. Petty refusals should not be tolerated.

3. The 30 day initial response period is too long. In practice many agencies wait until the end of that period to release records. Speedy release could be assured if agencies used experienced personnel, effective communications and high-speed technology, and if they had the will to promptly release data.

4. Time extensions in Section 9 of the Act are ill-defined and they lack sufficient time cut-offs. Currently, departments are able to:

   (i) set down their own definitions of what constitutes lengthy record requests and, until July 1, 1986, what constitutes interference with their operations (Section 27 of the Act);

   (ii) engage in all kinds of lengthy consultations - some of which are not required by the Access Act - and take a fairly passive role in ensuring that third parties reply promptly (Section 28), again, in part because the Access Act allows them to do so without sufficient time constraints, deterrents or penalties;

   (iii) claim as unavailable any records that are going to be publicized in 90 days or more (Section 26).

5. Slow responses should result in the application of strong penalties. Currently there is no great stigma attached to being slow in processing information requests. Departments are well aware of the fact that the Information Commissioner is slow to review time-delay complaints and that her decisions in support of a complainant amount to little more than mild reprimands of the guilty parties.

6. The complaint-appeal procedures have to be subject to time limits themselves.

   Currently, the Information Commissioner can take months and even years to respond to time-delay complaints by Access Act users; the Commissioner does not operate under public regulations that indicate time-delay complaints will be given precedence. Time delays may not always be the Commissioner's fault, however, since staff shortages and departmental delays in replying to investigatory requests can add months to the length of an investigation.

The receipt of an Information Commissioner ruling on an exemption-based complaint can take months. In addition, more time can be taken if representations are made subsequent to the ruling and if a formal finding has to be prepared by the Information Commissioner.

Finally, Federal Court hearing dates may not be available for some time, and much time can pass before hearings are held and rulings are made.

7. Information on environmental, health and safety matters should be released very rapidly. There is as yet no succinct provision in the Access Act for instant information response to urgent environmental, health and safety issues.

B. Recommendations

In order to ensure a comprehensive overhaul of the time-response provisions in the Access Act, the following amendments are needed:

1. The initial deadline for the receipt of information should be 15 rather than 30 working days

2. No access application should be considered incomplete on the grounds of minor deficiencies that can be promptly rectified and resolved within 2 working days

3. No more than 3 working days should be necessary in order to transfer access requests from one department to another

4. A department should only be granted up to a 45 day time extension under exceptional circumstances when it is requested to provide access to records which:

   (i) comprise over 10,000 printed pages and that are certified by the responsible Minister as not being readily available or

(ii) require a complicated computer program that is certified as needing a minimum of 10 additional working days to develop or

(iii) require third party consultations which are certified as necessary, and where the identified provinces, international organizations and corporations are willing to acknowledge in writing that they are responsible for the longer time periods or

(iv) require up to an additional 30 working days to be published.

5. Any departments that fail to meet the initial deadline of 15 working days should be required to give notice and show cause to the Information Commissioner, who should then be able to immediately penalize responsible individual departmental officials $25 per day if she deems this necessary. Officials that fail to meet the total extended deadline of 60 working days should be required to show what available records they released before the deadline, and they should be required to explain why they should not be penalized by the Information Commissioner with fines of $100 per day. Additional penalties against departmental officials of up to $10,000 should be levied if it is proven that a department did not comply with time limits and refused to reply within 120 working days, because of wilful obstruction. The penalties that are collected should not be turned over to the general Consolidated Revenue Fund; instead, the money should be used to fund independent educational and assistance programs for access users. *

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* One American proposal calls for a requestor to be directly awarded both litigation and penalty costs.

6. The Information Commissioner should render decisions on complaints about delays, fees or Section 26 (information about to be published) within 5 working days.

7. Complaints to the Information Commissioner about exemptions other than Section 26 should be ruled on before or no later than 30 days if the complainant requests such an immediate ruling. Otherwise, the complainant would have the right to proceed directly to Federal Court. Federal Court appeal applications should be heard and ruled on within 30 days provided the applicant requests an immediate ruling.

8. In cases when there is a public need to know about an environmental, health or safety situation, agencies should respond to a request for information within hours, and have a complete reply ready within 5 working days.

These measures are meant to encourage departments to act quickly and respectfully in regard to requests for access to federal records.

Departments may view more stringent time limits and tougher penalties as impractical and unreasonable. However, the present abuse of time deadlines can and does make a mockery of a system of access to information, and amendments to the Access Act, itself, are necessary in order to help encourage quicker response times.

CHAPTER II: ACCESS FEES - PROBLEMS AND CHANGES

A. Background

Access fees, in my experience, are a major administrative barrier to obtaining federal information, even though many access users pay little more than the initial access application fee.

This user has been subject to access fee payments ranging from five dollars to a few hundred dollars. Access fee estimates in the case of some applications made by the author have been as high as thousands of dollars. *

As an unpaid citizen researcher for the majority of my applications, or even when working for clients, I have only rarely been granted waivers beyond the $25 cost of photocopying. Some departments are very rigid when it comes to access fees and then tend to use them as a deterrent to accessing information. In complaining about unreasonable fees, so far I have had very little support from the Information Commissioner in terms of fighting specific unfair fee practices.

As a taxpayer, I have also felt that it is unjust to pay additional costs, particularly when much more costly information programs do not have a user-pay component as part of the cost philosophy.

Several of the problems experienced by this author in the area of access fees are described below, under headings drawn from the different types of fees and fee practices permitted under Section 11 of the Access Act.

B. Application Fees

The application fee was created primarily to prevent the Act from being used frivolously. All the $5 fee appears to accomplish, however, is a decrease in access usage and an addition to the administrative costs of the Access Act.

Most departments collect the $5 despite this author's view that agencies can automatically waive the fee. ** The CRTC was the sole exception as they automatically returned $5 application fee payments.

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* The largest initial fee request for search, preparation and photocopying was for almost $80,000 made by Agriculture Canada for their various meat hygiene status reports. These fees were not paid as available summary data was accepted.

** Section 11(1) states that such a fee "may" be collected whereas the accompanying regulation says an application fee "shall" be collected. (Regulation 7(1)(a)). Departmental discretion is therefore possible as to whether or not to collect the $5 application fee.

The Information Commissioner recommends paying the $5 application fee, then trying to have it waived. But Treasury Board does not recommend that departments, if applying administrative fee waivers on the first $25, waive the $5 application fee given its reputed mandatory nature; and most departments abide by that questionable directive.

The $5 application fee, in fact, becomes more than a barrier to keep out the frivolous users. It appears to be downright unfair in the following instances when information is denied to the applicant and a refund mechanism is not offered by the department.

Information is denied to applicants:

- when the requested records do not exist
- when exemptions applied result in total denial of any records
- when the information is already publicly available
- when the information is in a reading room
- when the information has already been released under the Access Act
- when the requested information comprises the department's access procedural manual or the department's record index manual. *

I have personally challenged the decision by three agencies to deny me access to their access procedural manuals and record index manuals. I argued in Court that this action was a form of constructive refusal of information and the case went all the way to the Federal Court (Court File T-194-85). The motion was lost, but the presiding judge in his decision of October 4, 1985 did

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* Most departments have now recognized that the above situations should result in a $5 refund. Other departments, however, such as Agriculture Canada, hold to the position that if work is done on an application, then $5 is a reasonable fee to charge for that work.

note my representation that there is a great deal of inconsistency in departmental practice when it comes to collecting a $5 fee for these manuals. Sixteen out of the nineteen federal agencies that I requested manuals from did not demand a fee.

It is also worth noting that the Department of Health and Welfare and the RCMP actually rejected processing parts of my Access applications on the grounds that I did not clearly state that part of my request. These agencies demanded an additional $5 fee to have the application rewritten.

Photocopy and Other Reproduction Fees

It is difficult to tolerate the official Access Act photocopying charge of 25¢ a page when I can walk into places in Ottawa and obtain a rate of 6¢ or better. Although I am careful to take advantage of the opportunity to view documents first, before I decide what to photocopy, the 25¢ charge is a definite impediment to selecting necessary documents to reproduce.

Fortunately, not all agencies consistently charge this high fee for photocopying. Some agencies like the Public Archives charge only 10¢ a page and the Atomic Energy Control Board, the National Capital Commission and the National Energy Board charge 15¢ a page.* Other agencies try to get around the high fee by forgiving and waiving the first $25 (or more) of photocopying.

The Information Commissioner and others are quite fond of citing the case where Treasury Board charged me $4.75 to reproduce 19 pages of requested information. Treasury Board rebuffed the Commissioner in 1984 when she presented some evidence of the availability of lower photocopying fees.

Right on time for the Parliamentary review of the Access Act, Treasury Board has in April, 1986 quietly lowered its photocopying rate to 20¢ instead of 25¢. This rate is meant to include labour costs. This rate is still not low enough and Treasury Board has not established any means to compensate users who have paid the higher 25¢ fees for far too long. It is not at all clear to this

* The National Capital Commission as part of its move to a more restrictive information policy raised its photocopy rate in May, 1986 to 20¢ a page.

author why users should have to pay a portion of the labour costs in connection with what should be high speed photocopying that lasts only a few minutes.

Search and Preparation Fees

The fees that I have had the most difficulty with are search and preparation fees. The fees charged by agencies under Section 11(2) can be enormous and the requests for these fees can be made quite unfairly.

For instance, I was asked for over $54,000 from Agriculture Canada for meat hygiene reports, $2200 for CRTC staff reports, $3000 for Agriculture pesticide toxicology review reports, $7500 for NCC executive meeting minutes, $3390 for DRIE's cabinet discussion papers, and $2200 for minutes of the meetings of the Board of Directors of the Canadian Commercial Corporation.

None of the above fees were paid by the author. Where possible, I negotiated to have the fees waived (eg. the Canadian Commercial Corporation agreed to forgive this charge), or I split up the application into smaller identifiable requests (eg. this was the case in regard to the NCC executive meeting minutes). In other cases, I made the scope of the application more narrow (eg. as in the case of the Agriculture toxicology reports), or I abandoned the application altogether.

Several examples will serve to show that departments are very inconsistent when it comes to levying search and preparation fees:

- External Affairs asked for $250 in search and preparation fees for a request to review its 1983-84 Access Act applications. This amount was higher than the combined total of the fees charged by 19 other federal agencies who received identical requests.

. Finance, RIE and Transport were the only three agencies who levied search and preparation fees to retrieve and sever their cabinet discussion papers. Sixteen other agencies did not charge these fees and one, Justice Canada clearly stated that these documents were of public benefit so the burden of locating and processing them lay with the Government of Canada. This matter is currently part of a Federal Court action (Court T-992-86).

Search Fees

Search fees can be a deterrent to proceeding quickly with an application under the following circumstances:

. when departmental records are poorly organized *

. when inexperienced personnel search for the requested information

. when departments charge the applicant for the extra time needed to find regional or archival records

. when departments charge the applicant for the time needed to reorganize record files

. when departments charge the applicant for the time needed to sort through unorganized files to find relevant records

. when departments use the threat of such fees to force an applicant to abandon or narrow down the original application

The solution is to have a much more liberal free-time period for searches, and to have departments use their discretionary powers not to charge search fees at all. If a department wishes to charge

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* As reported in Opening the Door A Crack (1984), many departments have record keeping practices that are below the acceptable Treasury Board - Public Archives standards. The September 1985 Archives report to Treasury Board on the State of Record Management is highly critical of many agencies' record keeping practices. Applicants are being penalized for sloppy record keeping.

for search time, it should be required to meet publicly acceptable standards of excellence in productivity and record keeping practices and, it should provide the applicant with a detailed breakdown of the search time.

Preparation Fees

Unlike search fees, which may have some validity in cases where a long search must be made to retrieve information, preparation fees are discriminatory and contrary to the spirit of access. Preparation fees are supposed to be charges to cover the costs of preparing information for disclosure. In practice, Treasury Board and departments have interpreted this to mean that preparation fees cover the costs of cutting and pasting severed records. *

Such cutting and pasting might be done by inexperienced personnel using time-consuming technical aids, including correction fluid and slow speed photocopy machines.

By charging preparation fees, therefore, agencies are often requiring applicants to pay twice for photocopying, and if a severed record which was previously released under the Access Act has not been kept, then the applicant may be charged again for preparation costs.

Another unfair aspect of preparation fees is that they are charged at the same rate as search fees. This is quite unfair because searching for information can require considerable skill, but preparing information for disclosure only requires manual and clerical efficiency.

Preparation fees present an unnecessary barrier to access. Severing information can be a positive feature of access to the extent that it prevents departments from claiming total exemption.

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* The author is currently challenging the validity of Treasury Board's interpretation of Section 11(2) in the Act and Regulations wherein it defines preparation charges as a type of physical surcharge on severed non-computerized records. (Federal Court Case File T-992-86).

It is not fair, however, to turn around then and charge users for physically deleting exempt data. This practice is especially unacceptable when an applicant pays for severances and finds upon receipt, a package containing many near-blank or blank pages. I have had several unfortunate experiences with departments such as RIE who seem to take pleasure in applying the severance principle as if it was a fee collection device.

Reducing Search, Preparation and Reproduction Fees

Access users who want to avoid large search and preparation costs or photocopying charges have several legitimate options open to them. They can narrow their applications to take advantage of the $25 waiver offered by some agencies for photocopying charges, or they can request that only five hours of work be done, specifying the records that they want processed in that time period.

Some agencies like External and the National Capital Commission become very concerned when applicants use these techniques. They want users like myself to be classified as abusers or to be limited in the number of applications they can file. They justify their action by pointing to the Quebec access legislation which includes a clause that gives agencies the right to turn down abusive applications. *

However, the Quebec clause has been tested in specific cases and does not place a limit on the amount of applications one user can request. The solution for agencies and applicants alike, lies more in the direction of having a larger number of free search and preparation hours, a more reasonable exercise of departmental discretion as to when to charge such fees and charging only after adopting recognized productivity guidelines.

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* Section 126 reads in part that "requests that are obviously improper because of their repetitious or systematic nature" can be rejected under the authority of the Quebec Access to Information Commission.

E. Computer Record Charges

The suggested charges for computer time are 25¢ per second, $16.50 per minute, $990 per hour and $5 per person per quarter hour for the time spent on programming a computer. Treasury Board suggests that lower rates be applied where the technology allows it; the charges were set against a main frame computer technology but they can be much lower when micro technology is used.

I haven't had much experience with computer record charges and do not know therefore, if departments are over charging when it comes to computer fees. However, unless departments meet acceptable computer record keeping standards (which most do not) and use trained personnel to retrieve computer records, then abuses can occur in the charging of computer fees.

F. Access Fee Estimates

Section 11(5) of the Act does allow for fee estimates to be given to applicants. The problem is that such fee estimates may be vague, inaccurate, and late in coming. It is not much good to applicants to have estimates provided several months after they are requested or to be denied the opportunity to have an informal estimate before they apply.

Further, fee estimates can be abusive. For example, when the estimates are too high, an applicant may abandon the application without lodging a complaint. Also, an applicant may be notified of a time extension but only find out about fee estimates at the end of that time extension. The applicant would then be put in a position of having to decide months later whether to proceed with the application.

The most helpful assistance an agency can provide (in addition to discussing the requested records) is to give immediate and as accurate an estimate as possible, even if they are only based on a review of a sample of the records. Knowing the amount of potential

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* After 4 months, Transport Canada issued the author a large fee estimate of $950.

costs and, if possible, viewing a sample of the requested records for free, are two essential qualities of a user-friendly access operation. *

In regard to this last point, applicants, where possible, should be able, informally or formally, to see samples of the merchandise (i.e., the records) before purchasing them. ** Some agencies have taken it upon themselves to do all or most of the work without consulting the user. *** And even when the applicant does not want or need all of the records, agencies often expect the user to pay for their work and lack of communicative skills and flexibility. ****

G. Access Fee Deposits

Under Section 11(4) of the Act, an applicant may be required to pay a deposit when search and preparation or computer fee charges have been estimated.

Many departments have different deposit rules, but they usually request from 5% to 50%, or a percentage of a certain fee level (eg., $100, $250, etc.) beginning at $10 or $100 or $200. Some departments have engaged in "low-balling" tactics where an initial "come-on deposit" is charged. *****

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* The Privy Council Office has been most helpful to the author in this regard.

** The author actually returned photocopied documents to CMHC once he realized the data would require a payment and was not worth the requested monies.

*** This user filed a complaint on behalf of the Canadian Rights and Liberties Federation against External Affairs for giving a late-fee estimate after it had proceeded with much of the work. The Information Commissioner's Office ruled that it was not a violation under the Access Act for a department to produce a late-fee estimate, or to refrain from negotiating a lower fee estimate for work that was processed, whether it was required by the applicant or not.

**** It is even more difficult to negotiate and discuss fee estimates and to work out a means of viewing a sample when applying for access to information outside Ottawa.

***** RIE wanted this user to pay a $30 deposit as a sign of "good faith" that the applicant would eventually pay the total fees which could end up being as high as $3390 for search and preparation alone. This type of consumer practice is frowned upon in federal competition legislation.

H. Fee Waivers

Perhaps the breaking point that makes users rebel against costs is the lack of any fee waivers, despite the perception of some users that their requests for waivers are valid under Section 11(6).

It is best to put fee waivers into two categories: an administrative category where it is simply not worth it for agencies to collect fees (Treasury Board sets $25.00 as the rate); and a general waiver category where the government can agree that a waiver or refund to the user is in order because the waiver benefits the public's right to know.

I. Administrative Fee Waivers

When the cost to collect fees exceeds the fee, the situation is ripe for an administrative fee waiver. Unfortunately, for access users, Treasury Board changed the initial administrative forgiveness fee from $50 to $25, excluding the initial $5 application fee. Many agencies allow the $25 fee waiver but only for reproduction costs. * This type of waiver should be higher, to reflect true administrative collection costs. It should also be recognized separately in a revised Section 11(6) of the Act.

J. Fee Waivers in the Public Interest

Under Section 11(6), fee waivers can be granted on a very broad basis, not specifically related or restricted to instances where internal costs are greater than the fees charged. Most of the fee waivers that have been granted to date, therefore, have been in situations when the $5 application fee has been refunded or when an agency has allowed waivers on the first $25 of photocopying costs. The Treasury Board waiver figures should not be misread to show that many public interest fee waivers have been granted.

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* The RCMP only allows a $10 fee waiver for reproduction costs.

This applicant can attest from personal experience that "public interest fee waivers" (Treasury Board refers to these as "public benefit" waivers) are rare indeed. Although I have applied for a waiver in hundreds of applications, I have only been granted two: Justice Canada decided that my research in relation to one application was in the public interest; and the Public Service Commission forgave my fees in another case. In both instances, the actual fees assessed were under $100. *

Applicants should be eligible, in most cases, for public interest fee waivers. Unfortunately departments seem to act according to the following unwritten code-of-conduct:

- they use caution when considering a waiver request, and try to avoid being the only agency with a liberal fee fee waiver policy
- they automatically suspect that an applicant may be making money from his or her use of the Access Act, so they act cautiously when considering fee waivers
- they let the users think that they may obtain a fee waiver by stating that they will consider granting them one after deposits have been received and after the work on the applications has been done
- they tend to be possessive of documents that are in the public interest and are reluctant to trust applicants who claim that they have a right to know about some information.

Most departments do not adequately address several important issues when they decide whether to reject fee waiver requests. All too often they fail to consider how widely the information is disseminated; whether the individual applicant intends to use the documentation with various publics or with public interest groups; whether

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* This applicant has received some administrative fee waivers where the $5 application fee was returned or the first $25 of photocopying charges were forgiven.

individual applicants really profit from using the Act as opposed to doing it as either a public service or as part of a job or towards making a partial living; and whether applicants can afford the fees. *

This applicant has tried to alleviate this problem of a reluctance to grant fee waivers by splitting up chronologically or by subject matter broader applications, abandoning applications, negotiating fees requested and doing whatever else he can to fight high access fees. Canadian citizens interested in using the Access Act should not have to pussy-foot around like this. They should be eligible for fee waivers, as are researchers, public interest groups, journalists and others under the American Freedom of Information Act.

K. Use of Collected Access Fees

This user advocates a unique means of recycling access fees. Rather than simply putting them in the Consolidated Revenue Fund, all collected access fees should first go to fund a toll-free system for callers seeking government records. The remainder should go to independent citizen clearinghouses which would promote and monitor the use of the Access Act. Never under any circumstances should fees be retained by individual departments. This can lead to selfish revenue hunting and abuse.

L. Accountability for Access Operation Costs

Treasury Board, under Section 70 of the Access Act, helps to assess administrative operations, including costs. The Board however, is primarily an internal control agency. It does not necessarily provide regular evaluations of whether departments are providing users with

* Some agencies simply refuse to believe that an individual might use the Act for the public's benefit. For example, simply because I have acted on occasion as a consultant, mainly for the media, in filing Access Act applications, and have published and sold research reports on access (usually at a loss), some agencies have concluded that I should not be eligible for public interest fee waivers. Environment Canada even went so far as to refer to me as a consultant in its reply letters even though I applied as a citizen using my name only and no occupational description. I wrote to the Minister to protest this uncalled for labelling which he assured me would be changed.

a cost-efficient delivery service. Parliament and the Auditor General have the prime responsibility to assess these kinds of costs. The Parliamentary review committee established under Section 75 of the Act can play an important role by assessing proposed departmental budgets and expenditures related to access operations.

M. Access Costs at the Complaint-Appeal Stages

Complaints to the Information Commissioner should remain a free service, and this provision should be stated specifically in Section 30 of the Act.

The Federal Court should continue to have the right to award and assess costs as is now permitted by Section 53. But this provision should be amended to indicate that Federal Court costs should not be assessed against users except in the most exceptional cases. Large costs, for example, are often justified in cases where corporate third parties are involved.

Cost awards should cover lawyer's fees as well as the time lay people spent in preparing for court appearances. This would make it possible for the general public (excluding those who stand to substantially gain commercially) to take their cases all the way to the Federal Court, with less financial hardship. *

N. Recommendations

The existing access fee schedule and practices need revisions as follows:

1. Section 11(1)(a) should be deleted from the Access Act, thereby abolishing the application fee. This action would go a long way toward encouraging greater use of the Access Act. It would eliminate the problem of trying to determine when application fees should and should not be collected.

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* A lay person could still hire a lawyer and hope that the lawyer's costs would be recoverable. Also, to be consistent, lawyers representing themselves should be eligible for court cost awards. In my Court case against Public Works (T-495-85), an out of Court cost settlement will likely include obtaining my disbursement expenses (but not for my time spent on the case) along with my counsel receiving costs for preparation and appearance time.

2. The photocopy rate should be set by law at 5¢ a copy or a better available rate for a large volume of copies.

   The Information Commissioner after investigating photocopy rates did access users a disservice by failing to issue a Special Report to Parliament in the last two years requesting lower photocopy fees. Treasury Board's recent reduction of the photocopy rate to 20¢ is still very high. Departments should continue to have discretionary powers to decide whether to waive reproduction costs entirely.

3. Discretionary search fees should not be levied by any department for the first legitimate 100 hours of work. Fees should then only be charged for work over 100 hours if the department's records search process has been certified as efficient by Public Archives officials.

   Departments should also adopt uniform guidelines to measure the time officials need to do effective record searches. In keeping with the timing recommendations, search fees should not be charged if the work is not ready within 60 days.

4. Discretionary preparation fees should be abolished and Section 11(2) repealed.

   The Government should reject the alternative of more clearly defining the nature of preparation fees in the Act. Such a definition would be difficult to reach; it would have to state the productivity levels that preparers should be expected to conform to before they qualified as efficient "cutters and pasters". It would have to include the provision that preparation fees should be totally refundable for improper severances.

   The Government should also reject the argument that the solution lies in having all users share the cost of preparation. This assumes that more than one applicant will request the same information and that "fairness" lies in

continuing to levy preparation fees. The author rejects both of these assumptions.

5. Computer fees should be scrutinized by a special public-private sector committee at two year intervals. The Committee should solicit public comments and report its findings publicly, and the Government should act to lower computer fees if the Committee so recommends.

   As government records become more computerized and more users become able to gain access to government information via a computer network, computer charges will likely have to be decreased considerably. They may eventually have to be discontinued completely.

   The following points should be considered by the special committee as it studies computer fees:

   a) Access users should be provided a certain amount of free computer time (at least the first 5 minutes, depending on technological speed capabilities, and possibly up to ten hours, if the department maintains poorly kept EDP files and uses inexperienced personnel to retrieve computerized records).

   b) Computer time and program charges should change monthly to reflect the best government or private sector rates.

   c) Rates for computer diskettes, magnetic tapes and transmitting computer information should compare favourably with the best rates that are available in private sector companies using the leading computer technology.

   d) No special computer entry fees or other charges added to straight computer time or programming should be introduced as a way of making money for the Government.

   e) Those users without resources to own computer equipment should not be unfairly penalized or be forced to pay higher rates (eg. for photocopies of computer printouts) than users who are equipped with computers.

6. All fee estimates under Section 11(5) should be as detailed as possible and made available within 10 days. Where possible, a free sampling of requested records should be provided to an applicant.

7. Deposits should be no higher than 20% of the estimated value after the first $250 of estimated charges. Deposits should be returned if no information is found, if the applicant abandons the request or if the application takes more than 60 days to process.

8. After 60 days, all fees collected should be refundable to the applicant. The applicant's right to information would remain intact.

9. The first $100 of charges should be waived automatically (regardless of fee tariff category) to save administrative time and costs. This figure should be written into the Act as an administrative fee waiver and it should be reviewed and indexed every two years to account for inflation.

10. Public interest fee waivers should be encouraged, registered and decided on within 30 days. Flexible criteria to assess such requests should be adopted. Section 11(6) should remain as is, but a new separate clause should be added as Section 11(6)(ii) that states: "fee waivers are available for cases where the material sought is in the public interest and distributing the information would primarily benefit the public".

    Waivers should be granted when it is shown that broad public access to the requested information will somehow benefit the public. This should be the case whether public employees consider the information to be critical of the government or not.

    Cases of financial need should also be considered when granting public interest fee waivers. And requested proof

must be handled in a delicate fashion; it must not be used to help one set of applicants over others.

The system of fee waivers must be encouraged and it must be publicized so that citizens know which agencies are making such waivers. The office of the Information Commissioner should mediate fee waiver conflicts and twice a year list the agencies that have a flexible and inflexible waiver policy.

11. The first 50% of collected access fees should go towards a toll-free system for callers, and the remainder should go towards establishing regional citizen-access clearing-houses. The Access to Information Centre, proposed in the next chapter should play a key role in deciding how to disburse these funds.

12. Complaints to the Information Commissioner should remain a free service.

13. Federal Court costs should not be charged to users except in the most unusual cases. Cost awards should cover non-commercial applicants' preparation and court appearance costs, including any legal fees they may have incurred.

14. The Parliamentary review committee established under Section 75 and the Auditor General should periodically evaluate access operational expenditures to ensure such public monies are being effectively spent.

CHAPTER III: GREATER ACCOUNTABILITY IN ACCESS RULE MAKING

A. Background

A major problem with the Access Act, to date, has been its failure to live up to the spirit of access implied in Section 2 of the Act. Many access operations have not been user-friendly and open to public participation in its development. This problem was explored in some detail in Opening the Door A Crack (1984).

The access rules were developed behind closed doors. They promote administrative secrecy and they do not encourage public employees to assist access users. The access rules are rigid, complicated and formal. Far too many departments fail to treat access as an opportunity to truly assist the public and this is true not only in Ottawa but across Canada as well. The Access Act has not been used very much by Canadian citizens and the access rules have helped to cause this problem. *

The access operations of about 130 agencies who are covered under the Act differ drastically, with the result that applicants do not always receive proper treatment when they try to gain access to information. Some agencies like Health and Welfare lack adequate skilled staff to meet the needs of access applicants and the level of training among departmental officials varies widely.

Agencies also differ in terms of the way they treat applications. Some treat them as opportunities to serve and assist the public, while others focus on the opportunities to apply exemptions, collect fees and delay information. Agencies like Communications Canada, Defence, Fisheries and Oceans, Labour Canada, Supply and Services and the Privy Council Office run flexible offices that really try to assist users. Agencies like Treasury Board, Finance, the RCMP and RIE, however, tend to be rigid in applying the Act.

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* Other factors that may account for the low usage of the Access Act are a lack of publicity and public education program; little outside support for citizen clearinghouses to assist access users; public perceptions that records are in poor condition and hard to find; broad exemptions; and potentially high fees and time delays for an Access Act user.

Departmental access operations are not always open to public scrutiny. The author had a difficult time dealing with External Affairs and RIE, for example, when he tried to find out about their previous Access Act cases as part of a research project for the Canadian Rights and Liberties Federation. Departmental annual reports in general (except for the ones at Communications Canada and Fisheries and Oceans) do not even mention the actual cases that departments had processed.

A Globe and Mail survey of 12 departments (November 26, 1985) noted that some departments are reluctant to provide information about their access operations and that the job descriptions of some access officials actually include the instruction to protect the government from embarassment when releasing information to applicants.

Not all agencies follow the same access procedures or share similar release policies. For example, some agencies waive the first $25 of photocopying while others do not; and some agencies rigidly apply the policy advice exemption to executive meeting minutes while others do not.

The answer to departmental inconsistencies does does not lie in tight central coordination where minimal standards are likely to be applied instead of a system where departments could have more flexible, accessible departmental operations than the norm. The solution, in my opinion, lies in creating an Access to Information Centre, an Information Commission that acts as an advocate * and an active Parliamentary review committee. In these ways, departmental access policies and practices can be compared and publicized. The most flexible departmental operations can receive praise and encouragement even when they go well beyond the minimal standards and requirements of the access legislation. The less flexible departmental access operations would receive bad publicity, be subject to investigation and their officials called to testify and their access program retested at least annually until their operations improve.

B. Recommendations

A user-friendly system requires an attitude of openness rather than a self-serving concern for protecting information.

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* Refer to Part III for further discussion of this point.

More open access operations, in addition to limited exemptions, can be created by amending the following sections of the Access Act:

- Section 2 should incorporate a statement that the promotion of openness in government and the active provision of assistance to citizens who seek information are among the main purposes of the Access Act
- Section 6 should stipulate that experienced rather than inexperienced employees are needed to assist users in filling out the detailed Access Act applications
- Section 71 should set acceptable standards for the regional and national reading rooms where federal records can be inspected. These standards should include accessible locations that are well publicized and contain basic departmental record inventories, manuals and policy statements. *
- Section 72 should require annual reports by government institutions that provide a concise but comprehensive history of each application in that fiscal year, including the subject matter of the application, the exemptions that were invoked, the fees that were charged and waived, the time it took to process the application, and a description of the material that was released. **

Greater flexibility and knowledge of departmental access operations will also require stronger monitoring and remedies for abuses. This user suggests the creation of an independent Access to Information Centre. The Centre's mandate would include:

- holding public hearings to determine access rules
- receiving standardized reports from federal agencies on their activities under the Access Act

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* The Information Commissioner, after the July 1, 1985 deadline for departments to set up reading rooms, conducted a sample survey that noted most departments had reading rooms but of varying quality.

** Currently, the designated Treasury Board minister largely determines what is reported on in the annual departmental access reports. Following Treasury Board existing instructions ensures relatively uninformative reports. Treasury Board claims it is up to departments what goes in their annual reports.

- issuing timely comparative reports on departmental responses to access requests
- maintaining an up-to-date inventory of information released and denied
- conducting a public education program to inform Canadians about the Act
- reviewing departmental fee charging practices at regular intervals
- providing assistance to citizen groups who wish to participate in the access rule-making process.

Members of the Centre should be appointed by and made accountable to Parliament. Three to seven appointees should be drawn from and recommended by public interest groups, government, labour, corporations and the media. The appointees should not be government employees and the Centre should not be a government agency. The agency would replace Treasury Board and Justice as the government designated coordinating agencies.

While the government would still require a designated Minister(s) for administration and policy issues under the Act, the experience with Treasury Board and Justice indicates that government coordinating agencies can be secretive and have little or no desire to act as a watchdog for enforcing access legislation in the public interest.

The Parliamentary committee designated under Section 75 of the Act should also be given a wider mandate as a Standing Committee on Access to Information. It should be given the power to:

- review access operations and examine government information expenditures and programs
- communicate regularly with the Information Commissioner, the Access to Information Centre and the Auditor General
- receive complaints about access operations and call departmental officials to report on their access operations
- assess all regulations and directives made under the Access Act
- examine all federal legislation, especially any proposed secrecy provisions to ensure that the legislation conforms with the revised Access Act.

. conduct major reviews every four years.

The Committee should be headed by an Opposition Member of Parliament, have permanent staff and resources, and be separate from a permanent Parliamentary Committee on Privacy.

The existing access rules and operations do not encourage openness and release. A system where openness is rewarded and secrecy is penalized must be established in order to shape a new government environment that is conducive to access. A willing attitude on the part of a majority of public employees and flexible departmental practices cannot otherwise be expected to be created.

CHAPTER IV: UPGRADING RECORD KEEPING AND INFORMATION SERVICES

A. Background

This researcher explored the sloppy record keeping practices and inefficient information management systems of 19 agencies in his 1984 report entitled Opening the Door A Crack. The report showed that the lack of an efficient and accountable federal information system was undermining the Act. Further, the point was made that until the federal record keeping and publication practices are put in order, departmental officials should not be allowed to collect access fees.

These problems with record keeping and information services still exist today. Treasury Board noted in its March 1986 Report to the Commons Justice Committee (page 28) that:

> The Archivist reports that while there has been improvement in the management of government records, there are still some shortcomings which affect the accuracy and speed of retrieval.
>
> The Archivist and the Treasury Board Secretariat are developing an action plan to accelerate implementation of the policy record management policy.

After surveying many of the institutions covered under the Access and Privacy Acts, the Public Archives had this to say in its third Annual Report to Treasury Board (September 1985, page 32):

> Departments have been slow in resolving problems. The records management function generally is still not receiving adequate support and resources. A large proportion of the government's records are still unorganized and not scheduled for ultimate disposal or retention.

One problem area that is likely to receive some discussion in the fourth Annual Report by Archives to Treasury Board is the poor shape of the computer record keeping practices in most federal agencies. Many agencies lack even the most basic knowledge of how to control their electronic data bases, some of which are disappearing before any authorized record disposal has occurred.

The Minister responsible for the Archives, Marcel Masse, introduced Bill C-95 (Archives Act) in February 1986 in an attempt to provide a firmer legal basis for record management. Record management still needs upgrading. The proposed legislation does not have tough enough provisions, such as penalties for improper record practices, to ensure that departments will take record management more seriously.

The current Access Act is not designed to resolve record management problems. In fact, it may contribute to such problems by focussing on an Access Register based on classes of records rather than on up-to-date departmental record inventories. Placing greater onus on departments to provide sufficient detail for users to be able to file Access Act applications would stimulate more effective and more accountable record management.

An additional and parallel problem is that there has not been a comprehensive and comparable review of information management problems and a careful assessment of how the Access Act works (or does not work) in tandem with established information release practices.

As of yet, no Treasury Board guidelines exist on how departments should interpret Section 2(2) of the Act which allows for a continued emphasis on the existing practices related to information services. The President of Treasury Board in his May 6, 1986 appearance before the Justice and Solicitor General Committee had stated that over 85% of information flows from non-Access Act sources, but he did not back this claim up with specifics. * Employees are, however, also becoming more reluctant to provide information that they used to release in the absence of an Access Act request. In practice, the Access Act in some agencies is becoming an excuse to shut the door on the provision of informal information as provided under Section 2(2) of the Act. **

As well, barriers are increasingly making published government information more difficult to obtain. For instance, publications are becoming too expensive and some are out of print or no longer updated. ***

Another problem is that there is no provision under the Access Act that allows for the creation of non-computerized records in response to Access Act requests. Only computer records can be created under Section 4(3) of the Act.

Yet another problem is that there is an insufficient reference base related to the information that is held by the government. Departmental publication indexes and record inventory lists are incomplete; agencies are not required to produce them under the provisions of the Access Act.

The Access Register itself is limited to describing classes of records. It is not very helpful, therefore, when one wants to find out about government records in detail and how to quickly retrieve desired information.

A final problem is that the Government of Canada has a very

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* A closer examination of the established government information services would likely reveal the vast majority of such services are oriented to public relations, uncoordinated and repetitive and not very cost efficient or effective.

** Members of Parliament are being told, for instance, that they too must use the Act, despite the traditional information channels they have. I have received a fair amount of published data in reply to Access Act requests and as well have been told, mainly in cases where the published data is rather superficial, that I should use the Act.

*** No fees, however, are assessed against publications and handouts that the government judges to be of public benefit.

incomplete knowledge of its published material holdings, which are excluded from the Access Act under Section 68. Many working papers, for instance, have only a limited degree of circulation and distribution.

In some cases, government information is treated more like a record than a published document. Librarians sometimes call this type of data that falls between published and unpublished material "grey literature". The Archives has resolved this problem somewhat by classifying some of its available but less known information holdings as "public records", not subject to the rigid confines of the Access Act.

There is a serious problem when the Government of Canada cannot even define what it means by the term published material and when publications or indexes on publications become more expensive and less available across Canada. There is a problem, too, when the communications guidelines contained in the Government Communications Guide of the Privy Council Office, are amended to make it harder for public employees to provide information in the absence of an Access Act request. *

B. Recommendations

The reforms that are needed to improve the government's information services are not presented here, but an immediate review of these services is needed. Improving the quality of the Canadian government's record keeping practices will require a broader and tougher approach than is offered in the proposed Archives Act amendments.

As for specific problems associated with record management and information provision, as they relate to the Access Act, a few proposals are presented below as possible amendments to the Access Act.

- Section 2 - broaden the purpose of the Access Act to include active assistance to record seekers

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* These matters will be dealt with in greater detail in Part IV of the report.

- Section 3 - provide for a new class of information called "public records", which refers to material that is not published but is readily available for public inspection in departmental reading rooms and libraries across Canada. Public records should include basic agency policy records and position papers
- Section 3 - indicate that all records released to applicants under the Access Act should be considered to be released to the public-at-large and should therefore be made readily available for public inspection
- Section 4 - allow for the creation of records in traditional (non-machine readable) situations, either to answer the information request or to add an explanation about the released records, when necessary *
- Sections 5 and 6 - provide for an electronic Access Register and up-to-date departmental record inventories in sufficient detail to be helpful to access users.

These revisions to the Access Act may not herald a perfect system of over-the-counter information that has been efficiently stored and retrieved. Yet, along with other changes in information policy, the revisions can hopefully create a renewed climate that sees the government willing and able to communicate and interact with the public.

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* This is a key amendment that should make the Access Act more of an information service. It has not been added so that government officials can offer apologies or justifications for past actions. The preparation of such material should be done promptly within the suggested time deadlines.

In two instances, government agencies tried to manage the information they provided to me. In one case, Employment and Immigration responded to my request for the Privacy Commissioner's audit report of two of its exempt Immigration banks by enclosing a note stating its disagreement with the requested record. Agriculture Canada, in the other case, released some meat inspection reports and added a note that explained the nature of these reports and, in not so subtle a fashion, warned that the use of these records could be distorted and could lead to misleading media stories.

PART II: SECRECY ROADBLOCKS

Under the present Access Act, information denial is a common problem. Treasury Board statistics show that in about 40% of the cases access is granted. In about 25% of the cases, information is denied for administrative reasons (no fees paid, insufficient information etc.); and in about 35% of the cases information is denied, either totally or partially, on legal grounds contained in the Act's exemption and exclusion sections. This means that information refusals are high, both for administrative and legal reasons. The low release rate cannot be rationalized as a steadily improving situation.

Most complaints made to the Information Commission concern legal exemptions and exclusions. Also frequent grounds are the administrative reasons for information denial (time delays and fees charged).

The grounds for information denial that are examined below include the formal exemptions under the Access Act, cabinet confidences and ministerial records, and other more subtle means of refusing to grant access to records.

CHAPTER I: EXEMPTIONS - THE FLEET OF MACK TRUCKS

A. Background

I myself have been denied, in part or in whole, a wide range of information on the basis of the various exemptions found in Sections 13 to 24. * Personal experiences with Sections 13, 19, 20, 21, and 24, are highlighted below, after the following example of a case of information denial.

* Section 27 (transitional period) is supposed to fall into disuse on July 1, 1986. It should not be reconstituted. This exemption was misused by some agencies as a means of avoiding the release of records before the 1978 to 1980 period. For instance, the CRTC, an agency established in 1975, made use of this provision.

A Case Example

The breadth of some exemptions is illustrated by the following case, which this user took all the way to the Federal Court, and lost. The RCMP applied Section 16(1)(b) (investigative techniques) to part of a June 27, 1983 letter from the Ministry of Forests in B.C. that requested confidential treatment for certain documents. The RCMP blanked out two lines in the annex, even though the B.C. government did not categorize the two lines as being confidential. The Information Commissioner, however, upheld the RCMP's discretionary severing of parts of the annex of this letter.

Mr. Justice Jerome, presiding over oral arguments on January 9, 1986, immediately ruled that the RCMP's use of the class exemption Section 16(1)(b) was acceptable despite the arguments of the author that:

a) The Justice Canada Counsel acting for the RCMP had stated the definition of investigative technique under Section 16(1)(b) was all encompassing and very broad, in clear contrast to the Access Act's object clause, which states that "necessary exceptions to the right of access should be limited and specific";

b) The undisclosed investigative technique which formed the subject of severance, was probably already known in public court proceedings, and by some suspects and other members of the public. Further, the Access Act is "not intended to limit in any way access to the type of government information that is normally available to the general public";

c) Another department, Employment and Immigration, in exercising its discretion, released information under a similar application that related to information about an investigative technique it uses with the B.C. Ministry of Forests (i.e. cross-matching B.C. Ministry of Forests discharge employment records with UIC records to check for UIC fraud). *

* A good example of departmental inconsistencies in applying exemptions is the case where Southam News received documentation from Environment Canada on leaded gasoline. Energy Mines and Resources had refused to release similar information, claiming exemptions.

Mr. Justice Jerome indicated in his February 5, 1986 ruling that release of the exempt technique could hamper what was described as a "routine part of police work". Yet its existence remains secret because the RCMP was able to invoke a class exemption without "significant injury" test. A significant injury test would force the Court to weigh whether the technique was highly sensitive, or whether it was already publicly known.

Another record sought in the same Federal Court case illustrates the arbitrary nature of exemptions. For about 22 months, this user was denied the name of an international organization that had written the RCMP to request confidential treatment in its dealings with the RCMP. The RCMP refused to provide this information claiming the protection provided by Section 13(1)(b) and Section 16(1)(c).

Justice Canada, after my Federal Court action had been initiated, requested permission from the unnamed organization for the release of its name, but was refused. Upon requesting External Affairs to appear in Court to explain the international organization's position, however, the Canadian government won the consent of the organization, which turned out to be NATO, just before the applicant went to argue his case for release.

NATO's relationship with the RCMP is publicly known, and I realize that its exchanges with the RCMP have to be largely confidential. But any organization that wants secrecy treatment from Canada should not be allowed to keep its request for general confidential treatment secret. Without the perseverance of Justice Canada (and my Court action), the total secrecy allowable under Section 13 could have allowed this information to remain hidden forever.

B. Section 13 (Confidential Submissions From Other Governments)

Experience

Section 13 presently effectively protects and encourages other governments - provincial, municipal or international - to have secret relations with the Canadian government. Section 13 can detrimentally and unnecessarily undermine access to significant records. For instance, trans border records on environmental and health problems could remain hidden forever.

Section 13 according to Treasury Board statistics, has primarily been used to date for documents from foreign governments (Section 13(1)(a)) and provincial governments (Section 13(1)(c)). Claims for confidential treatment for Access applications made have rarely been requested by international organizations (Section 13(1)(b)) or municipal or regional governments (Section 13(1)(d)). Section 13 was cited in about 5% of all Access Act application where information was refused under one exemption or another.

I did a research project for Southam News in 1984 that exposed the widespread use of exemptions by governments under Section 13 and by corporations under Section 20. * Eight provinces or their agencies in 1983 told 12 federal departments that they wanted confidential treatment continued under the Access Act. Some provincial agencies in Ontario and New Brunswick even wanted their letters of request for confidential treatment kept secret; the Information Commissioner, however, urged them to reconsider when she received complaints. **

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* The Ottawa Citizen, June 6, 1984 contains a partial account of the findings, as does Testing the Spirit of Canada's Access to Information Act (1984).

** The Commissioner, however, did not believe that she had the power to question Section 13 in cases where a proper claim for confidentiality had been made.

To make matters worse, the correspondence showed that two federal departments helped to encourage the provinces and corporations to seek in-confidence treatment. Health and Welfare encouraged provincial ministries of health and social services to seek secrecy arrangements. Agriculture Canada wrote to four trade associations (3 Canadian and 1 American) requesting their views on how to classify and possibly restrict the release of meat inspection audit reports. *

Most federal authorities, to their credit, stated in their replies to provincial requests that they would review such requests for confidentiality on a case-by-case basis, and would refrain from concluding, as Alberta had wanted to do, that all records submitted since 1905 should be considered as potentially confidential. However, the only official who has criticized the breadth of confidential claims is the Privacy Commissioner. He has seen cases of personal information denial that resulted from such claims by provincial governments.

Provincial 1986 submissions to the Parliamentary Justice Committee indicate that provinces remain adamant about retaining Section 13's mandatory nature.

Recommendations (Section 13)

The most abusive features of Section 13 should be eliminated by:

1. Publicizing all general claims for Section 13 privileges
2. Judging each discretionary Section 13 application on a case-by-case basis
3. Judging appeals on the basis of a "specific injury" test
4. Setting a ten-year maximum limitation to all claims for confidentiality.

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* Over 50 corporations and several trade associations wrote to the 12 federal departments to request that some of their submitted data be treated as confidential under Section 20(1) and that they be consulted first before information about them was released.

C. Section 20 (Commercial Information) and Sections 28, 44 and 51 (Third Party Procedures)

The business community successfully lobbied Ottawa for a broad commercial information exemption (Section 20(1)), and also succeeded in winning Section 28 (third party notification), 44 (direct Federal Court objections) and 51 (Court orders not to release commercial information). Their American counterparts have been trying for years to introduce such exemptions into the United States Freedom of Information Act. Consumer groups did succeed in retaining in the Act the release of environmental and product tests (Section 20(2)) and a public interest override provision (Section 20(6)).

According to Treasury Board statistics, Section 20(1) (particularly 20(1)(b) and (c)) is one of the most commonly used exemptions. It is used in almost 25% of the cases that are claimed to be subject to exemptions. No figures have been compiled on the number of Section 28 third-party notifications sent to corporations and to other third parties, the number of Section 20(2) test result releases, the number of corporations under Section 20(5) consenting to release of commercial information or the number of public interest override releases under Section 20(6).

The application of Section 20 has been met by a fair degree of satisfaction, both on the part of the business community and government officials. * Their view on the whole is that Section 20 strikes a fair balance between legitimate corporate secrecy and the public's right to know. The consumer view has been that Section 20 does not strike a fair balance.

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* One study done in 1985 by Elizabeth Longworth entitled Report on the Response of the Business Community to the Access Act and purchased by Justice Canada, indicates that the majority of members of the business community surveyed were pleased with the degree of protection afforded commercial information, and realized they had as much protection as before the Access Act came into force. The Longworth study notes that some of the government officials from industry-oriented departments surveyed were prepared to err on the side of restricting disclosure of information sensitive to business interests. Some officials resented outsiders fishing for corporate information.

Each subsection of 20(1) is separately examined below, after which Section 20(2) and (6) are reviewed.

Section 20(1)(b) (confidential commercial information)

Section 20(1)(b) in particular allows a broader than necessary protection of commercial information. The key test to claim Section 20(1)(b) includes labelling commercial data confidential and applying the label consistently. This lends itself to the situation wherein a great deal of commercial information, submitted or collected by government, is considered secret unnecessarily.

The counsels and access consultants hired by corporations and some agencies like RIE, advise quite readily that agencies stamp their submitted documents "confidential", to start laying the groundwork so that confidential treatment can be claimed for almost all of their data.

But the business community is able to hide behind Section 20(1)(b) without the application of any valid injury test and is able to press for a confidentiality test under Section 20(1)(b) that is as broad as possible. Corporations appear to have the support of the Canadian government to the extent that it wants a broader common law, objective test of confidentiality to apply. (Justice Canada Communique number 5, May 1984, page 6)

The business community spokesmen are even against the narrower confidentiality test adopted under the American Freedom of Information legislation that Mr. Justice Jerome referred to in his decision on the 1984 Maislin case. This jurisprudence in the United States limits claims of corporate confidentiality to 1) anything that impairs the government's ability to obtain necessary corporate information in the future and 2) circumstances that cause substantial harm to the competitive position of corporations.

The argument that government's sources of business information would dry up is repeated time and time again. Yet it is doubtful that this would happen as the business community in turn relies as much on government information and fully well knows that simply labelling data confidential is a position with which they will not always be successful in blocking commercial data release. I suspect that few corporations are providing their consent to release under Section 20(5) commercial information about themselves.

The Parliamentary review committee will hear from both business and consumer interest groups and has to consider the necessity for retaining Section 20(1)(b) in the Act.

Sections 20(1)(a) (trade secrets), 20(1)(c) (commercial injury) and 20(1)(d) (contracts and negotiations) provide sufficient protection to commercial information.

Section 20(1)(c) (commercial injury)

Section 20(1)(c) has at least some legitimacy as a permissive (but not as a mandatory) exemption for corporate information. It is a valid argument that corporate information should be kept confidential if sufficient evidence exists to show that the release of that information will result in material financial loss or gain to competitors.

However, unless one challenges this exemption via the review system, evidence of injury might not be submitted by corporations to the departments that apply the exemption. For instance, Agriculture Canada accepted the meat packers' position for about 2 years that the release of their reports would be injurious to them. The Department responded by exempting negative comments in the meat inspection reports on meat packing sanitation and processing procedures. Only after the Information Commissioner asked the meat packers for proof of injury (which they did not produce) did Agriculture Canada agree to stop its claim for Section 20(1)(c). Some large meat packing firms are fighting this decision stating that the injury would result from media reporting (i.e., possible distortion). Section 20(1)(c) was not intended to serve as a "media injury" exemption.

Section 20(1)(a) (trade secrets)

Most parties also agree that Section 20(1)(a) (trade secrets), if applied in a restrictive and discretionary sense, has legitimacy. The problem is that the common law definition of what constitutes a trade secret is not incorporated in the Access Act; nor is the definition necessarily restrictive enough. The public interest override clause (Section 20(6)) does not apply to Section 20(1)(a), therefore the trade secrets exemption is a class exemption without an injury test.

Two cases illustrate well the problems involved in using Section 20(1)(a). In one case, the chemical formula of UFFI has been kept secret because it is a trade secret. Yet, UFFI is a controversial substance that causes various health problems, so there are very good public interest health reasons for releasing this information.

In another case, Health and Welfare refused to release the identities of drug and food manufacturers submitting Section 20(1)(a) claims on the basis that none of the many companies making such claims (other than Proctor and Gamble) had cited in writing Section 20(1)(a) in their submissions. Health and Welfare in their annual access report acknowledges receiving many such trade secret submissions. The agency hides behind Section 20(1)(a), fearing that releasing the identity of companies may somehow provide a clue about the submitted trade secrets.

Section 20(1)(d) (contracts and negotiations)

Section 20(1)(d) may have some merit, on a discretionary basis, if it can be proven that the release of information would cause injury in valid negotiations and contractual situations. The problem is that this amendment can be subject to abuse where serious negotiations are not underway with a third party, and when a contract with a third party, valid or artificially created, is used as an excuse to hide corporate information.

One example of possible abuse is Agriculture Canada's acceptance of the claim by Lakeside Packers Ltd. (located in Brooks, Alberta) that parts of the meat inspection audit reports for its plant should be subject to 20(1)(d) because the data could be used

by the shut-out union, United Food and Commercial Workers (UFCW). The union is conducting a consumer boycott against the Safeway Stores supplied by this plant. Lakeside Packers, which is using non-union labour, has to claim that it is conducting serious labour negotiations in order to apply for Section 20(1)(d). The shut-out union says serious negotiations are not going on.

Another example where a Section 20(1)(d) citation was accepted by Agriculture Canada was the severing of parts of a meat inspection audit report on Caravelle Foods Ltd. of Mississauga, Ontario. The reason given was "contractual relations with a third party". This can be questioned if the third party that Caravelle supplies is generally known.

Recommendations (Section 20(1))

Corporations with resources and high-priced lawyers can and will find the loopholes and convenient broad wording in Section 20(1) of the Access Act and they will use them to their advantage. The Canadian Government must plug those loopholes and refuse to submit passively to corporate abuses of Section 20(1). The Act has to restrict what business information is potentially exemptable.

The author has six recommendations related to improving the situation with respect to Section 20(1):

1. Apply both an injury test and a public interest override test to Section 20(1)(a), and restrict the definition of a trade secret under Section 20(1)(a)
2. Delete Section 20(1)(b) (confidential commercial information)
3. Allow Section 20(1)(c) (commercial injury) to remain as is, but with a five-year limit for non-release
4. Tighten Section 20(1)(d) to prevent its use in a conspiracy (i.e. require certification of valid contracts and negotiations and proof that such contracts and negotiations will

substantially be harmed by the release of certain commercial information

5. Make the application of Section 20(1)(a), (c) and (d) discretionary, rather than mandatory

6. Section 20(1) cannot be used as a rationale for denying the existence of records under Section 10(2) of the Act

Section 20(2) (3) and (4) (environmental and product testing)

Section 20(2) was developed by consumer interests to facilitate the release of environmental and product testing information but its application is meeting corporate resistance.

StarKist Canada Ltd. was prepared to argue in Federal Court that its canned tuna test results were not properly explained (20(3)), they were only preliminary test results (20(4)), and "an evaluation of a product that results in the product not being available to the public" is not the result of a product test. Essentially StarKist's arguments were directed at preventing the release of the test results; media and political events, however, overtook its legal case for non-release.

Another tactic to avoid releasing test results was taken by Agriculture Canada. Agriculture accepted the meat packers' argument that government meat inspection reports should be classified as commercial information (Section 20(1)) rather than environmental and product testing information (Section 20(2)) and should not therefore, be fully releasable. This party to existing Federal Court actions brought by large meat packing firms, is currently arguing that Agriculture Canada made a legal error in citing the commercial injury rather than the consumer protection clauses of Section 20.

Departments like Agriculture and Health and Welfare also want to use Section 16(1)(c) to exempt parts of consumer inspection reports rationalize that their future ability to investigate companies depends on their cooperation from these businesses. These agencies have forgotten whom they should represent - the public - in their inspections.

Section 16(1)(c) (law enforcement) should not be used as a back door means to exempt negative comments in consumer, health and environmental inspections. These investigations are checking for non-compliance with health and safety rules and are in the public interest to release.

In addition, Section 20(2) is limited by the wording that it excludes testing done "as a service to a person, group or persons or an organization other than a government institution and for a fee". This clause permitted the Canadian General Standards Board (CGSB) to refuse me specific paint test results because the initial tests were paid for by the paint manufacturers before they were submitted to the government to demonstrate that government standards had been met. As well, the results of tests done by CGSB to verify manufacturers' tests were not released because the testing was done by private laboratories and it involved what CGSB considered to be confidential information. This paint test information collected for a government agency is of use to consumers and should not be withheld.

Testing done for a fee where the information provided is given to obtain government approval or meet government requirements must be made available for public inspection.

Recommendations (Sections 20(2), (3) and (4))

- Retain the first portion of Section 20(2) that permits the release of product and environmental test results. Section 20(2) should also make it clear that the entire test results are accessible

- Include in Section 20(2) the testing results by government laboratories done for government agencies

- Delete from Section 20(2) the wording "unless the testing was done by a service to a person, for persons or an organization other than the government institution and for a fee"

- Refuse to incorporate a clause that allows government institutions or corporations to withhold results because the information may be considered misleading or potentially may be distorted by the media

- Revise Section 20(4) to allow the release of preliminary testing methodology for industry and public comment

- Revise the Act so that it clearly states that consumer, health and environmental inspection and compliance reports do not fall under the gambit of Section 16(1)(c); rather they are Section 20(2) releasable test results.

Section 20(6) (public interest override)

The reputed counter-balance to the use of Section 20(1)(b) is the public interest override provision (Section 20(6)). Apparently, this override is rarely used, particularly because it is not a mandatory provision to check Section 20(1) use. Section 20(1) use is mandatory and frequently used as a broad class exemption by some agencies to protect business information.

Along with a wide-open Section 20(1)(b) clause, the business community spokesmen are pressing for an even weaker discretionary public interest override clause where the onus would be placed on the government to explain in writing (and to defend if need be, in Court) the reasons for overriding a decision to keep reputedly confidential commercial information secret. In other words, corporations would like to convert the public interest override clause into an injury test that governments would be reluctant to cite because of the long and expensive Court challenge that they could anticipate coming from the business community.

Recommendations (Section 20(6))

Section 20(6) should be made a mandatory reason for immediate disclosure in cases of public health, safety and environmental protection. Applying Section 20(6) should not be limited to "grave" health, safety and environmental matters. The onus must not be placed on government to notify corporations of their intention to apply Section 20(6).

Sections 28, 44 and 51 (Third party procedures)

Section 20(1) exempts corporate information in unacceptably broad ways. Even if Section 20(1) is revised, corporations hardly need the additional protection provided to them by Sections 28, 44, and 51. The myth is that such special protection is required for corporate information so as to prevent competitors from obtaining information which, under Section 20(1), is largely not releasable.

Special notification (Section 28) and Court privileges for third parties, primarily corporations (Section 44); have been called "reverse access to information" clauses. * Some government authorities criticize Section 28 as too time consuming and cumbersome. Some business users want more time and an exclusive in-writing only reply procedure adopted as part of the notification process. The author also sees in this provision a bias against the timely and substantial release of data. Further, the provisions make public employees over-sensitive to the action of releasing corporate information.

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* Some agencies take a very wide definition of "third parties" as defined in Section 3, and have even included Section 28 notification to federal crown corporations not covered by the Access Act. Other agencies include their lengthy consultations with the provinces or even with other federal agencies as the equivalent of Section 28 third party notifications.

The most dramatic time delay abuse of Section 28, to date, prevented the author from receiving timely meat inspection audit reports which Agriculture Canada said it would consider releasing. * Due to the intervention of the large meat packers, receipt of the information will probably be delayed from one to three years.

The use of Section 28 can also prevent the release of data that might otherwise have been releasable had corporate interests not been given special privileges of prior objection. In 1984 Energy, Mines and Resources originally released some Section 20(1) request letters requesting confidential treatment from several oil companies, including letters that the company had wanted to keep secret. When EMR applied Section 28 to the remaining letters, two oil companies (Chevron Canada Resources Ltd. and Mobil Oil Canada Ltd.) objected to the release of certain categories of information they wished to keep secret. I complained but the Information Commissioner supported such a severance.

Section 44 can be used by the Canadian government to proclaim its "neutrality" in Federal Court proceedings initiated by corporations on the issue of corporate information release. This places the onus on applicants to fight companies for the release of corporate information. The Federal Court can then be placed in the awkward position of ordering corporate information to remain secret (Section 51 of the Act), rather than letting the Canadian government fight the case for corporate secrecy, with corporate third parties joining the Court proceedings. Some Justice Canada officials believe that government legal counsels should not even be involved in Section 44 Court proceedings.

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* The Government has up to an 80-day-time-limit to release requested records that contain commercial information, but this time period can be subject to extension as it was in the case of the author's request for meat inspection audit reports in which a total of 110 days was granted when the deadline for receipt of most information is 30 days.

Section 44 allows corporations the special right to go straight to Federal Court. So far, there have not been any successful Federal Court actions against objections to the release of corporate information although much of the Court's time has been devoted to such cases.

Recommendations (Sections 28, 44, 51)

- Delete the provision in Section 28 for extra-time privileges for third parties and delete Section 44's direct Court objection privileges for third parties. *
- Delete Section 51 and revise Section 49 to provide the Court with the power to order that certain records should not be released to applicants.

D. Section 21 (Policy Advice)

Section 21 is the so-called "Mack Truck" exemption because policy advice can be withheld for twenty years. What the author wrote in 1983 when the Access Act Treasury Board directives were first released still holds true today; policy advice can be used by "every manager up the chain (to) try to claim a Section 21 exemption". (Ottawa Citizen, June 22, 1983) There is insufficient rationale for a decision to subject policy advice from public employees to a wide-open exemption, without a clear explanation of harm or consideration of public interest.

Section 21 is used in about 15% of all the Access Act applications that are subject to exemptions; and subsections 21(1)(a) and (b) are the most commonly used citations.

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* Third parties could still be notified under revised versions of Sections 35(2)(c) and 43 provided an applicant complains about a government's refusal to release third party information, provided they then wish to become a party to a Court appeal. Section 20(5) of the Act would also still allow the Government to consult with corporate bodies about releasing commercial information in certain circumstances.

In this user's experiences with the Access Act, Section 21 has been used widely to, for instance, exempt substantial parts of CRTC staff reports on telecommunications matters, Indian Affairs documents on native land claims, and Canada Insurance Deposit Corporation's Board of Director Minutes on their handling of trust and bank crises on behalf of insured depositors (Section 21(1)(a)(b)(c)). These matters are all subject for complaints to the Information Commissioner.

This user has experience in particular about the discrepancies on how Section 21(1)(b) (accounts of consultations and deliberations) was applied to either totally or partially deny access to several agencies' executive meeting minutes. CMHC and the CRTC refused outright to provide me with any of their meeting minutes, while the Atomic Energy Control Board (AECB), Canadian Deposit Insurance Corporation (CDIC), Canadian Commercial Corporation (CCC) and the National Capital Commission (NCC) all allowed me partial access to their executive meeting records. *

This user considered it to be quite a breakthrough in early 1985 when the Information Commissioner helped to convince AECB to finally release to me its Board meeting records after 22 months of deliberation. These records showed the problems that the Board faced with the nuclear industry, including the difficulties it had assessing nuclear reactor safety procedures. They became the source of several media stories including ones by Southam News.

A set-back in February 1986 occurred when the Federal Court decision, Information Commissioner versus the CRTC, came down. Mr. Justice Jerome indicated that the CRTC could use Section 21(1)(b) as a blanket class exemption to deny another applicant a specific portion of CRTC Executive Committee meeting minutes. The Commissioner

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* A report on my access experiences with these six Ottawa boards and commissions, to be entitled Opening Up the Decision Making Deliberations of Ottawa's Commissions and Crown Corporations, will be available in 1987.

had contended that Section 21(1)(b) should be restricted to accounts of consultations or deliberations "involving or held with a real view to briefing a Minister of the Crown or the staff of the Minister". She argued that subsection 21(2) (a) should apply to situations when regulatory decisions affect the rights of a person, and hence, policy advice should fall under this releasable section of the Act.

The Attorney General of Canada intervened in the Commissioner's Court action against the CRTC. The Government sided with the CRTC by stating that Section 21(1)(b) was intended to be a broadly worded discretionary class exemption without an injury test and not limited to advice rendered to a Minister of the Crown. The Justice Counsel argued that Section 21(2) provided little flexibility and could not be seen as a public interest override section.

As a result of the CRTC Court decision, the NCC has decided in May, 1986 to severely restrict its release of executive meeting minutes to me, and to mainly provide partial records of decisions taken at these meetings. This reversal of NCC's information release policy, occurring on my 31st application for such records, is the subject of a complaint to the Information Commissioner.

I am also fighting Section 21(1)(b)'s misuse by attempting to argue in Court that CMHC's citation of this section of the Act to totally deny me access to their Board of Director and Executive Committee records is improper (Federal Court File T-1019-86). The argument filed differs from that of the Commissioner in the CRTC case.

The severed executive meeting minutes I have viewed from the 4 agencies contain factual data; they should not be categorized as deliberations towards rendering advice to the Government. For the most part they are summaries deliberately written not to convey the full and frank deliberations that verbatim accounts may contain. Indeed, much of the records I have seen deal with matters related

decisions that are already quite well known. Other portions, however, contain useful information that should be made available to the public.

For the most part, severances were applied too widely by the 4 agencies and I have complained, for example, in the CDIC case. CDIC Directors, who include the Governor of the Bank of Canada, the Inspector General of Banks, the Superintendant of Insurance and the Deputy Minister of Finance, totally severed their 1985 deliberations regarding the Canadian Commercial and Northland Bank failures despite their public testimonies on these events.

I have also complained in the case of the Canadian Commercial Corporation's use of Section 21(1)(a) to deny me total access to the meeting minutes of the Industrial Advisory Committee set up by their Board of Directors.

Hopefully the CRTC Court decision will not be used by all agencies as an excuse to totally deny their consultations or deliberations for up to twenty years, effectively allowing each public service unit or each board or commission to operate as secretive "mini-cabinets". Agency business should not be hidden behind the umbrella of Section 21; the public is entitled to know about government operations.

Recommendations (Section 21)

This user believes that a political solution to Section 21 abuses will still be needed along with continuing legal challenges.

There are three legislative options that can curtail the wide open application of Section 21; all of them will undoubtedly meet with considerable bureaucratic opposition:

Option A - Delete Section 21 and rely on other defined exemptions of the Act that permit agencies to exempt certain types of policy advice *

Option B - Limit policy advice to pre-decisional matters and place a five year maximum time limit on the discretionary withholding of such advice. Make sure, as well, that the exemption is only applied in conjunction with a strict injury test and a public interest clause

Option C - Go beyond Option B by attaching a list of releasable records as in the Ontario FOI Bill 34 or the 1979 Canadian Bar Association Model Freedom of Information Bill list, and limit policy advice to advice (not analysis) that is given to Ministers and their staff.

Option B and C can be combined and are a more pragmatic solution rather than totally deleting Section 21. Nothing short of Option B and C is satisfactory to this user; otherwise, deletion of Section 21 and reliance on other exemptions, as revised, is the better option.

E. Section 24 (Statutory Prohibitions)

Section 24 consists of over 30 federal statutes that have mandatory clauses preventing information release. The use and abuse of Section 24 has not come to public attention because it

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* There are still other sections of the Act which provide exemptions for certain types of policy advice: law enforcement advice (Section 16), economic advice (Section 18), legal advice (Section 23) and security advice (Section 15). These sections, however, are much too broad. They should be revised to include: clearer definitions, injury tests, a public interest override provision and a stipulation that they only apply to pre-decisional advice, and for a maximum of five years.

is cited so infrequently. * Section 24(2) also provides assurances that over 30 statutory prohibitions listed in Schedule II of the Act will be reviewed by a parliamentary committee by July 1, 1986. **

Nevertheless, Section 24 citations have caused considerable difficulty for the author in several of his Access Act cases:

- Portions of Atomic Energy Control Board meeting minutes from October 1977 concerning the uranium cartel "gag" order were not released (Atomic Energy Control Act, Section 9)
- Revenue Canada denied the release of advance tax rulings received by Bell Canada Ltd. before and after its re-organization when the parent company became Bell Canada Enterprises Ltd. (Income Tax Act, Section 241)
- The Canada Deposit Insurance Corporation denied the author access to its 1985 Board meeting minutes related to the Canadian Commercial and Northland Bank failures (Bank Act, Section 251)

Section 24 is often applied in a questionable manner. For example, Section 251 of the Bank Act was used in the last case referred to above as absolute grounds for excluding references to bank failures. The Canadian Bankers Association is adamant that this clause be used to protect their members' information. But Section 251 is not a clear-cut mandatory prohibition against release, and some of the facts about the bank failures have already been the subject of public inquiry and public reports. Such mandatory statutory prohibitions may not be subject to meaningful review by the Commissioner and Courts.

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* Section 24 citations account for under 3% of all Access Act cases where there are exemptions cited. They are used primarily by a few federal agencies such as the Atomic Energy Control Board, Revenue Canada, the Department of Insurance and Statistics Canada.

** The number of statutes listed in Schedule II has changed over the years as some acts have been repealed since 1982, and a few acts with statutory prohibitions have been added to Schedule II.

Other troublesome aspects of Section 24 are: (1) why is it in the Access Act in the first place? and (2) is the list of over 30 statutory prohibitions exhaustive or are there other exemptions that should be reviewed in the upcoming parliamentary review.

A list of statutory prohibitions found in federal legislation had been prepared for Parliament as early as 1976 and, indeed, had already become the subject of a more careful review under the Conservative government's access bill in 1980-81. *

This Library of Parliament list contained 73 federal laws with statutory prohibitions. ** Many statutes were later dropped from the list as unjustifiable prohibitions because a high degree of Ministerial discretion was allowed.

Another concern about Section 24 is that instead of being deleted after the parliamentary review, Section 24 may grow as a "catch-all" exemption. For instance, the Canadian Chemical Producers' Association is one group currently lobbying the Parliamentary review committee to add the more restrictive release features of the Pest Control Products Act to Schedule II of the Access Act.

In the United States, the Freedom of Information Act contains a similar exemption (Exemption 3). The number of acts with statutory prohibitions has steadily increased in the United States to the point that there are now over 100 statutes and about 20 of them are cited frequently. The American "catch-all" exemption does not even incorporate every relevant act, including the Federal Aviation Administration Act.

The Justice Minister, in his May 8, 1986 statement to the Parliamentary review committee appears to be saying whether Section 24 is retained or abolished, consideration should be given to honouring many of the secrecy provisions contained in these over 30 statutes.

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* Justice Canada prepared some documentation during the period 1980-81 on acceptable statutory prohibitions. This information has since been provided to the 1986 parliamentary review committee by the author.

** See the Library of Parliament, Prohibitions Against the Release of Government Information Contained in the Statutes of Canada, November 22, 1976.

B. Recommendations (Section 24)

The Parliamentary review committee has the task to recommend Section 24's retention or abolition. In its review, it should not simply confirm that all the statutes have valid cases for secrecy provisions or assume where they do, that the provisions cannot be made more restrictive.

This user recommends the following three steps to ending Section 24:

1. Section 24 should be deleted from the Access Act
2. The over 30 statutory prohibitions should conform with the spirit of Section 2 and an omnibus bill should be introduced in 1987 to amend these acts to bring them in line with a revised Access Act
3. All legitimate statutory prohibitions for the release of information should fit within established and restricted Access Act exemptions. *

The Parliamentary review committee, however, through extending its Section 75 duties, should have the following added mandate after Section 24 is repealed :

1. Undertake a further review identifying all existing federal legislation by 1987, to ensure that these statutes conform with the spirit of Section 2 of the Access Act
2. Regularly review all new federal secrecy provisions to ensure that these statutes conform with the spirit of Section 2
3. Monitor and ensure that all new federal legislative initiatives should contain a preamble clause that guarantees every possible effort will be made to provide access to records and decisions resulting from the legislation.

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* The Information Commissioner states that deleting Section 24, in her approach, means adding to the list of exemptions. This would be a backward step in the development of access legislation.

F. Section 19 (Personal Information)

The goal of protecting personal privacy is a laudable one, but Section 19 (personal information) is simply being used too rigidly. * Section 19 is the most frequently cited exemption under the Access Act; it is cited in about 30% of all cases subject to exemption. The problem is that there is no residual balancing test to determine when the public interest clearly outweighs the invasion of privacy that would occur if access to personal information was granted.

Presently, the following pieces of information can be kept confidential on the grounds of Section 19:

- The views of lobbyists such as Frank Moores
- The RCMP's views on a paper about the Canadian Police Information Centre
- The name of UFFI assistance recipients listed in records at Consumer Affairs
- A copy of all the comments made by people to Health and Welfare in regard to its food irradiation policy
- The exact salaries of Privy Council Office order-in-council appointees
- The names of Access Act applicants who have applied to any government agency
- The names of MP's who have pleaded their case to Treasury Board on the rights of public employees to enjoy greater political rights
- The names and addresses of National Capital Commission tenants

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* It is also inaccurate to call Section 19 mandatory in light of the number of third parties entitled under Section 8(2) of the Privacy Act to access personal information records.

- The addresses of Commissioners from the National Capital Commission
- The files at Consumer Affairs on consumers' complaints against car manufacturers.

Although the government's desire to protect this information may be warranted on privacy grounds, it is unfortunate that no adequate mechanism exists for the parties involved to give consent for the release of the information should they want to do so. It is also unfortunate that releasable personal information is not defined in the federal Access Act as it is in Ontario's FOI Bill 34.*

Use of Section 8(2)(m) of the Privacy Act is an awkward and paternalistic method for releasing personal information in the public interest. Individuals should have the right to contest what constitutes an unwarranted invasion of privacy in situations where the data is not clearly releasable.

Recommendations (Section 19)

To reflect a better balance between access and privacy, the following types of government information should be made available to those who make a request:

- individual correspondence and comments on public policy matters
- consumer complaints about products and services
- correspondence and data in cases where a federal salary or benefit is received or requested.

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* The definition of personal information that is given in Section 3 of the Privacy Act should also be reviewed so that both the Access and Privacy Acts treat the matter in a consistent fashion. Refer to my 1986 report on Suggested Changes to the 1982 Privacy Act for a discussion of this issue from a privacy standpoint.

G. General Recommendations

Formal exemptions allow over 500 ways of saying no to an access applicant's request. The obvious change that is needed in the Act is to restrict its exemptions. Specific recommendations have already been discussed above which call for placing restrictions on Sections 13, 19, 20 and 21 and abolishing Section 24. All of the remaining exemptions should be limited and specific in nature, in conformity with Section 2 of the Act. Presently this is not true of Sections 14, 15, 16, 17, 18, 22 and 23 of the Act.

Section 2 of the Act needs to be revised in a way that puts certain conditions on the use of exemptions. All exemptions, for example, should be subject to a mandatory public interest override provision; they should be discretionary in nature; they should be subject to substantive injury tests; and they should be time restricted (to specified times that are never greater than 10 years).

Emphasis should be placed on applying Section 25 to sever exempt documents so that greater partial release of records is possible. Specific subclause citations where exemptions are applied should also be given.

Departments are beginning to plead labour problems in doing too fine a job at severances, according to the May 8, 1986 statement to the Parliamentary review committee of the Justice Minister, and this narrower application of the principle of severance can restrict documentation release.

The author believes that the severance principle's importance would be further enhanced if it was part of the Section 2 purpose clause of the Act.

Tightening up exemptions and applying severances broadly to the material are important legislative principles. Equally important, is a more responsible departmental discretionary use of exemptions. Departments may have a case to exempt certain sensitive

defence and law enforcement data but with so many exemption opportunities under the Act for secrecy, the usual practice for many departments appears to be to cite exemptions where exemptions can be made.

Some agencies, however, want even broader formal exemptions. Veteran Affairs, for instance, has interpreted Section 17 (safety of the individual) to include the psychological safety of an individual. The Public Service Commission wishes its "audit" functions were included under the investigative agencies operating under Section 16(1)(c) (law enforcement) of the Act.

The most sweeping change sought promoted by many agencies is to exempt drafts of documents on the grounds that drafts, unlike the final documents, reputedly can be misleading and of poor quality.

Another dangerous means of exemption has been found too whereby virtually all documents related to trade negotiations with the United States, or deemed to be considered documents somehow related to this subject, have to be centrally reviewed by the Trade Negotiations Office and External Affairs. It appears they are all being temporarily withheld and some of the documents likely will be permanently withheld as policy advice, cabinet confidences, and for other exemption rationales. This concept is being challenged by Canadian Press and at least one Member of Parliament.

One other new plan for greater use of exemptions comes from departments like National Defence who fear releasing one piece of information eventually helps a person dig up more sensitive data - the so-called "mosaic" effect.

It is going to be hard to combat the growing demands for even more secrecy and to tighten up exemptions so as to start having several hundred ways of saying yes to information release.

CHAPTER II: RESTRICTING CABINET CONFIDENTIALITY CLAIMS - SECTION 69

A. Background

One of the most controversial eleventh hour changes made to the Access Act in 1982 (after public hearings were held) was the exclusion of most cabinet confidences from the list of accessible information under the Access Act. The concern was that by being merely an exempt category subject to judicial review, the principle of cabinet solidarity would be placed in jeopardy by an outside review force, which could order the release of full and frank cabinet deliberations.

Despite the hue and cry about allowing the Canadian government's most basic records to be largely beyond the Access Act's purview for 20 years, the official Treasury Board statistics show that under 2% of all Access Act applications resulted in Section 69 citations.

But this is a misleading statistic because many Access Act users knowingly avoided applying for excluded Section 69 records; and in cases where users applied for records and Section 69 was cited, valuable documentation was denied for which there was not a sufficient appeal remedy.

The author, having received Section 69 citations in over 30 Access Act cases, can say that the existing Section 69 does not serve the public's right to know. It protects too many records which are now called excluded and inaccessible cabinet confidences and its use can be subject to abuse. *

The author demonstrated clear abuses of Section 69 citations in two cases when he applied for access to information. In one case, Treasury Board would not release its preliminary instructions to departments on the access legislation even though the information

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* Refer to my report entitled Access to and Denial of Cabinet Confidences which will be available in late 1986 and will contain a full account of my experiences with Section 69 citations.

was readily available from several other departments. Treasury Board's justification for this action was that, as a cabinet committee, it considered such administrative information to be cabinet confidences.

In the second case, Public Works Canada claimed that all of the documents on UFFI use in federal buildings were cabinet confidences, despite my belief that much of the data was factual in nature.

It was only after I was in a position to go to Federal Court, and wrote the Minister of Public Works challenging his claim of cabinet confidentiality, that hundreds of documents became accessible over several months. The Minister of Public Works had to write that his earlier certification was in error. He should not have said that all documents were to be excluded from release. I was only denied 75 documents (some partial and some full) on claims by the Clerk of the Privy Council that these records were cabinet confidences.

The data that was released identified over 130 federal offices and residences as having UFFI, including the Canadian Government Conference Centre. These findings were reported by the local and the national media and they proved to be useful to public service unions and groups of UFFI homeowners who were suing the federal government for negligence and damages.

Had I not persisted, the data would most likely still be secret. Unfortunately, there is no recourse in the Access Act for me or others to seek penalties and damages against Public Works.

In addition to questionable claims for cabinet confidentiality, the author believes that other Section 69 citations, while legally possible under the existing Access Act, are in some instances far too broad. For instance, 20 years is too long a period of time to keep cabinet confidences secret. * Having reviewed portions of

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* Very rarely in the past, as in the Coalgate Affairs or the McDonald Commission on RCMP wrongdoing, have cabinet confidences, because of political expediency, been released by cabinet before the end of the 20 year period.

cabinet meeting minutes from the nineteen-fifties and sixties, I can state that these summaries of cabinet deliberations are rather ordinary. They were written in a deliberate manner to be devoid of the full and frank discussion during the meetings and they contain little information that was not already known.

As well, some attention ought to be paid to the way different types of cabinet confidences are classified as being excluded and inaccessible. * The cabinet meeting agenda, for instance, could well be made accessible and disclosable literally the week after cabinet meets. I viewed every cabinet meeting agenda from the period 1954 to 1964 and the Privy Council Office could only come up with exemption citations for 11 out of hundreds of agenda items. Records of cabinet decisions are also a form of cabinet confidence that should be disclosed immediately upon request.

Further, had cabinet confidences been considered an exemption instead of an exclusion, the problems I have encountered with obtaining departmental cabinet discussion papers would not be so severe. In essence, the problem is that the severability principle does not apply to excluded cabinet confidences. Many documents that were labelled discussion papers, for instance, had a set of recommendations as a concluding section. These recommendations made the documents cabinet memoranda even though they were primarily factual. Had the factual component of such cabinet discussion papers been severable, sources have said that I would have obtained at least twice as many documents.

It is also most troublesome that so many of the excluded and inaccessible cabinet confidences, at least the cabinet memoranda, Treasury Board submissions, and briefing notes, are primarily of an administrative and financial nature rather than a politically sensitive one. The technical data may be destined for cabinet but it

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* Accessible cabinet confidences under Section 69 include most cabinet confidences over 20 years old and some cabinet discussion papers produced since 1977 as well.

is really only policy advice; it does not merit the strict controls that are placed on ministerial communications or deliberations. *

The Conservative Government promised the Auditor General, as of January 1, 1986, that it would grant him access to non-political cabinet confidences, but this as yet does not help the public's access to these documents. The Justice Minister, in his May 8, 1986 appearance before the Parliamentary review committee seemed receptive to the idea that the severability principle be applied to cabinet confidences.

Finally, the whole concept of accessible and disclosable cabinet discussion papers is both awkward and misleading. Some departments could not locate all their cabinet discussion papers or had to spend months figuring out which discussion papers were releasable. Once they were made available, too many of the discussion papers were severely exempted. Discussion papers where the related cabinet decision had not been made public remain excluded and inaccessible, as do, for four years, cabinet discussion papers where a cabinet decision was reached but not publicized. There is little logic in these distinctions. The fact now is that after mid-1984, no cabinet discussion papers have been produced, thus ending the availability of any cabinet documents before 20 years elapse.

My experience then indicates the need for both better cabinet record keeping management and for a more consistent release policy for cabinet confidences.

B. Recommendations (Section 69)

My experience indicates that the key to changing the breadth of claims for cabinet confidentiality is to have the principle of severability apply to cabinet confidences so that factual documentation can be severed from political considerations and recommendations.

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* The majority of Section 69 citations reported to the Privy Council Office for the period July 1, 1983 to March 31, 1985 were for correspondence between public employees or between public employees and their Ministers.

Then a great deal more cabinet information would become disclosable, both from the past and in the future.

Implicit in this change is that judicial review would apply to cabinet confidences since they would become exemptable and not excluded records. Such independent review could assess severances applied and continued claims for cabinet confidentiality. As the legislation now stands, judges can only receive government certificates verifying that records are cabinet confidences.

In order for that judicial review to be meaningful, de novo review that allows for a comprehensive review of the facts surrounding a decision to deny an applicant access is needed and not simply court proceedings to hear arguments whether the agency had "reasonable grounds" as the authority to make its claim of cabinet confidentiality.

As well, much more needs to be done in addition to ensuring that cabinet confidences are subject to judicial review. What constitutes cabinet confidences should be limited to:

- Cabinet and cabinet subcommittee minutes
- Inter-ministerial correspondence concerning cabinet or cabinet committee deliberations
- Ministerial political memoranda to cabinet that are severable from accompanying factual information and policy analysis

The above categories of exemptable cabinet confidences should also become accessible sooner than 10 years, under the following conditions:

- When cabinet makes a discretionary decision to do this
- When cabinet issues a press release or publicizes the decision

- If release of the information would not be injurious to international affairs and defence, as defined in Section 15 of the Act *
- If pressing environmental, health, safety and civil liberties issues override cabinet secrecy **
- If criminal evidence warrants a review of cabinet documents ***
- If a royal commission or committee of inquiry needs cabinet confidences to conduct its review. ****

This approach, to restricting what constitutes cabinet confidences and specifying conditions for early release will likely meet with great opposition from senior officials much more so than applying the severance principle to the broader existing categories of cabinet confidences. But it is essential as far too many documents are now being stamped cabinet confidences simply because they may go to cabinet and regardless of whether the Minister or Cabinet's signature and/or recommendations are affixed to the documents.

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* It would defeat the purpose of earlier release if nearly every cabinet matter was considered a "national security" situation.

** Decisions relating to the use of UFFI insulation in buildings should be included in this definition; so should matters such as nuclear accidents, toxic chemical waste discoveries, disease epidemics and decisions where constitutional rights are suspended.

*** Police, investigative and security forces should not go on "fishing expeditions". Their review of cabinet documents should be by court orders only. Current legislation forbids any review of cabinet documents by law enforcement agencies.

**** Cabinet documents were released to the Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police. The Trudeau Government allowed the release of hand written notes of an official who was taking the minutes for a cabinet committee on intelligence and security. This was done partly to answer allegations by the former director of the security service that Ministers had been given enough information to suspect that the Mounties might be conducting illegal activities. This Commission reviewed the problems of RCMP wrongdoings several years after the alleged events had taken place. The situation may arise, however, when commissions of inquiry require access to the most contemporary cabinet records.

Finally, as my own experience indicates, without efficient retrieval and availability, it would be difficult to obtain cabinet confidences in expeditious ways. In order to facilitate a better cabinet record system the following changes are suggested:

1. All cabinet decisions must be permanently recorded by law.

2. The existence or discontinuance of all cabinet records and their retention schedules, should be publicly known via published order-in-council regulations tabled promptly in the House of Commons by the Prime Minister.

3. Record indexes should be kept on cabinet records and should be made available to the public.

4. Cabinet and cabinet committee meeting records should be prepared automatically and made available after 10 years; inter-ministerial correspondence on cabinet deliberations and ministerial political memoranda to cabinet should become available after 10 years upon request under a revised Access Act.

These record keeping recommendations are useful internal management tools; they allow for greater information accountability and accessibility. Their implementation could be part of the revisions to the Archives Act which would complement a revised Access Act.

Revising Section 69 is key to restoring the credibility of the Access Act. Changing the conditions of access to and review of cabinet confidences has to be negotiable, like other reforms to the Access Act. Parliamentary democracy, ministerial responsibility and cabinet solidarity will not crumble if the public has a greater knowledge of some cabinet affairs. There is no area of exemption or exclusion that is sacrosanct and above thoughtful reconsideration.

CHAPTER III: BROADENING ACCESS TO MINISTERIAL RECORDS

A. Background

Most Ministerial records are excluded from the Access Act provisions; although not by statute as are cabinet confidences. Ministerial records that are referred to under the terms of the Access Act are: a) those housed in departmental files, (i.e. those under the control of a government institution); and b) those excluded or accessible under the terms of Section 69 (cabinet confidences) of the Access Act.

Treasury Board directives of September 1, 1983 on Ministerial Records (AIP 2005-9) state that ministerial records of a personal or constituency nature are excluded from the Access Act. More recently, the proposed Archives Act revisions, Bill C95, contain a definition of ministerial records that distinguishes a minister's personal and political records as beyond the control of a government institution.

The problem is that abuses can occur in cases where ministerial records are not of a personal and political nature.* Ministerial records detailing public expenditures or policies of an administrative and factual nature can be denied under circumstances when:

- The record of such departmental business resides only in the ministerial records
- Ministers or their exempt staffs orally question departmental staff about departmental business and instruct that no records should be kept about the questioning
- Records created by public employees seconded to ministerial staffs become excluded and part of ministerial office records

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* The recent letter from the Youth Minister to her colleagues that was leaked should not be an excluded ministerial record as the matter concerns public policy and expenditure, and not purely partisan affairs.

. Records in ministerial offices are unilaterally destroyed too readily or are taken by the ministers upon their departure from the office.

Ministers or their staff can avoid the terms of the Access Act by declaring records they wish excluded as part of the Minister's office records. Transport Canada, for instance, had used this tactic to deny a Globe and Mail reporter access to the detailed reasons given on ministerial flight requests.

B. Recommendations

The abuses that are created by excluding most ministerial records from the Access Act cannot be corrected by following the Treasury Board directive of putting all relevant records on departmental files. There are several possible actions that may prove to be successful, however. They are as follows:

1. Include all ministerial records under the Access Act that are not of a personal or purely partisan nature with the latter being defined primarily as records dealing with constituency matters. When ministerial records concern a) an expenditure of public monies and b) a public policy issue, then they should come under the revised Access Act

2. Formally make ministerial personal and political papers an exemption under the Access Act subject to judicial review

3. Include ministerial records in Section 3's definition of records under the Access Act

4. Insist that the ministerial records which are exempt under the Access Act should not be destroyed without the Archivist's consent. The proposed Archives Act Bill C-95 specifies that ministerial records cannot be destroyed or

disposed of without the consent of the Archivist although no penalties for wrongful practice are contained in the bill

5. Put strong incentives in place to encourage ministers to turn personal and political ministerial papers over to the Archives five years after a Minister resigns or after he or she is defeated or changes portfolios. This is in line with Bill C-95 which proposes the establishment of agreements between the Archivist and Ministers such that the Archives receives all ministerial records of historic or archival importance. Such records should be made publicly available within ten years.

CHAPTER IV: OTHER FORMS OF INFORMATION DENIAL

Not all forms of information denial are found in the formal exemptions and exclusions of the Access Act. First of all, there are a few sections of the Act which serve as exemptions although they are not clearly identified as exemptions:

- Section 5(3) of the Act can act like an exemption by allowing only classes of records to be identified and thus the user lacks the sufficient detail sometimes required to make knowledgeable applications
- Section 10(2) allows agencies to refuse to confirm a record's existence without even limiting this type of denial to sensitive law enforcement cases done under strict judicial supervision. *

* It is an insufficient legislative response to allow the Information Commissioner to hear complaints about the use of Section 10(2). There is also currently no penalty assessed should records be lost or wrongly destroyed.

- Section 26 which allows about to be published material to be exempt for at least 90 days can be used as a means of frustrating the release of timely information.

Secondly, some sections of the Act effectively deny access to information in a more general, yet indirect fashion:

- Section 4 denies foreign nationals access to information because it forbids them to directly apply for records.
- Section 3 denies Canadians access to many federal agency records, including those of many crown corporations, because it does not ensure that every agency is covered under the Act. All federal agencies should be covered under the Act without any future means of opting out.

Thirdly, the Access Act is administered in a way that contributes to government secrecy:

- There are often lengthy time delays without a cut-off point that frustrates access applicants. A blatant example of this practice occurred when the National Capital Commission slowly released its decision making records to the author out of chronological order, and deliberately held back meeting minutes where exemptions were applied or contemplated for even longer periods of time.
- Applicants are often forced to abandon requests when they receive large fee estimates.

Fourthly, some information denial results from practices originating beyond the Access Act:

- A reliance on the broad security classification of documents which began in 1956 can become the basis of information refusal.
- Sloppy record keeping practices often make it difficult or impossible to access requested information.

Fifth, the Access Act falls short in terms of its technical provisions:

- It does not allow for the creation of non machine-readable records in the event that such oral information is not available through established information channels.
- It does not require the full verbatim recording of certain types of deliberations such as commission, board or cabinet meetings.

Sixth, attempts are being made to avoid citing formal exemptions by changing the record format or the record provided. For instance, Agriculture Canada wants to provide less information by changing its meat inspection report forms. The National Capital Commission is substituting its decision record of executive meetings for the actual meeting minutes. Instead then of not keeping written records as a means of avoiding the terms of the Access Act, some departments are simply changing the format or eliminating certain records and substituting other records.

Lastly, some agencies are resorting to destroying draft documents once the final product exists or where this is harder to do, they are pressing to have such documents exempt under the Act. The Justice Brief April 1986, and again in its Minister's May 8, 1986 statement to the Parliamentary review committee, made it clear that some departments seek to eliminate the need to supply applicants with draft documents. This proposal could take the form of exempting draft policy advice under Section 21 of the Act or even be more widespread a challenge to openness by excluding draft records from the Section 3 definition of records.

These practices should all be recognized as forms of constructive refusal and they should be investigated and corrected. Indeed, the process of identifying and then correcting the subtle and the not so subtle means of restricting the spirit of quick, low cost access to government information should be an ongoing one.

PART III: IMPROVEMENTS TO THE COMPLAINT - APPEAL PROCEDURES

The review process under the Access Act has been tested by the author on a fair number of occasions. * The analysis and proposals presented below are meant to help improve the review process for the benefit of access users.

These comments and suggestions in the Access Act review process that follow are not meant to be prejudicial to cases presently under review.

CHAPTER I: INFORMATION COMMISSION - CLEARER ASSISTANCE TO THE USER

A. Background

The Information Commissioner has consistently acted as though she were a quasi-judge, rather than a mediator or a commissioner advocating the access user's case. Her Office engages in fact-finding based on the wording of complaints and the wording of the Access Act. Rarely does the Commission break with government access policy or consider that its findings can go beyond the narrow confines of the Access Act. Its support of complainants is usually limited to proven violations of the Act within those narrow confines.

Although the Commissioner and her Assistant Commissioner have gone beyond the Act's confines to help the author in his complaints regarding the use of Section 21 (policy advice), the Commission has been very cautious and non-supportive in complaints where:

- fee flexibility was sought
- there was evidence of inconsistent treatment by several agencies

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* A report summarizing these complaints and Court cases as well as personal Access Act cases will be available later in 1986. Some of the earlier complaints were described in Testing the Spirit of Canada's Access to Information Legislation (1984).

- an exemption (other than Section 21) was challenged as vague and unreasonable. *

I have asked for and rarely received an account of the written representations and recommendations made by the Commissioner on my behalf or on behalf of others. I have also never been allowed to be present at any mediation session with government officials or third parties. ** The position adopted by the Commission is that it must investigate my complaints in private under Section 35 of the Act and that communications provided by or to the agency in question can be privileged under Section 62 of the Act.

As well, the investigative process requires under Section 32 that the Commission give agencies advance notice of their investigations and also under Section 37(1) to report the results of well-founded investigations first to the agency. These procedures do not necessarily favour the complainant.

The Commission has not yet proposed or the government issued public procedures under the Access Regulation 77(1)(h) dealing with the way the Commission handles cases and interprets its assigned functions. *** This lack of written procedures may provide the Commission with greater flexibility but it takes away from user's expectations of specific results.

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* More than half of my 41 complaints dealt with either exemptions and/or fees; one-quarter about time delays.

** Some departments, however, have given me representations and recommendations that the Commission made on my behalf or for other complainants, although the name of the complainant was first removed from the records. In one case the Commission provided me with its letter of recommendations to CMHC deleting the portion dealing with fee waivers on the grounds this was not what my complaint was about. CMHC, however, provided me with the deleted paragraph.

*** The Commission, for instance, does not have any written regulations on whether time delay complaints should receive priority although its current practice appears to make this type of complaint the exception to handling complaints on a "first come, first serve" basis. The Commission gives complainants 30 days to respond to its findings before their files are closed although this is not a publicly approved regulation. This practice is somewhat ironic because it usually takes months for the Commission's findings to be issued.

The lack of access to the Commission's files, the lack of perceived Commission support, and the time delays that occur when the Commission responds to a complaint, have convinced the author that it is best only to approach the Commission with complaints when it is absolutely necessary or when the Act states that this route must be followed before proceeding to Federal Court. * The total number of complaints being submitted to the Commissioner, perhaps for this or other reasons, has been dropping.

When I have won a degree of openness from an agency beyond the narrow confines of the Act, it has been especially disappointing after filing a complaint only to find the Commission still claiming that my complaint is unsupportable under the Act. For example, the Commission rejected my complaint about the AECB's 25¢ photocopy rate and use of Section 27 (transitional period) as an exemption. This was after the AECB decided to charge me 15¢ a page after the first $25 of photocopying and stopped insisting that I could not access minutes of Board meetings for the period 1975 to 1980.

The few times that I received written representations from the Commission I realized that the Commission had not always argued my case in an entirely satisfactory manner. For instance, in my complaint against CMHC for denying me access to its meeting minutes, the Commission did not seem to try hard enough or use sufficient arguments to help me win access to those records.

The Commission appears to give departments far too much time to respond to investigations and recommendations.

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* Even with the appointment of two Assistant Commissioners and more investigators, the Commission still takes months to reply to complaints. One quarter of my complaints have taken the Commission more than a year for findings to be reported. An applicant, on the other hand, under Section 31 of the Act only has a year in which to file a complaint.

The Commission is also reluctant to use its power to subpoena departmental officials, and it does not alway act as a tough negotiator, sharing its problems in negotiations with complainants.

Many departments, however, according to the results of a 1986 Justice survey of departments tend to believe they are given enough time to respond to Commission recommendations.

It is disheartening to have a Commission that does not act agressively on behalf of complainants in a timely fashion. Changes to the Commission's procedures and functions are needed.

To her credit, the Commissioner has been a strong critic of the government in not promoting and publicizing the Act. She has also pointed out some of the problems that the Commission faces and has voiced her concerns during various speaking engagements. Yet, the Commissioner has not issued any special reports under Section 39 of the Act on specific problems, such as fee waivers and on high photocopy fees; nor has she actively prepared studies that evaluate and compare the access operations of federal agencies covered by the Act, particularly those agencies which are the subject of most complaints. *

The Commissioner's Office already undertakes activities to educate the public about its operations; it does not need any additional powers to promote the Act in this manner. The Government must still, however, do more to promote the Act.

B. Recommendations

The author would like to see a change of emphasis in the Information Commissioner's Office so that the Commission becomes more of a mediator advocating access user cases in an agressive and less legalistic fashion. To accomplish this, some fundamental changes are required in the structure of the Commission.

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* The Commissioner's May, 1986 Brief to the Parliamentary review committee mentions the work she has done in investigating in 1984 and 1985 issues about high photocopy fees and fee waivers. Her investigation should have concluded by issuing a Special Report on such fee issues and not several months later be confined to a subsection of her Parliamentary brief.

A main organizational change would be to have three full-time Information Commissioners, each with explicit responsibilities for complaint-mediation, litigation, audit and general investigation. These responsibilities would include:

Complaint Mediation - This function should emphasize getting the parties together and allowing complainants to have more knowledge of the investigations that are underway, and more chance to directly participate in public hearings.

Litigation - This function should be expanded so that a Commissioner can act as a public advocate for users, and more readily initiate Court actions.

Audit - This function should be explicitly expanded as well, to include the possibility that the Commissioner will conduct special investigations to compare departmental fee-waiver procedures, record keeping practices, reading room set-ups, and exemption citations.

In terms of speed in carrying out these functions, time delay complaints should be heard within 5 working days, and other complaints should be resolved within 30 working days. * If the Commissioners fail to meet these deadlines, then access users should be able to proceed directly to Federal Court. They should also be able to bypass the Commission completely and go straight to Federal Court on points of law. Thus the issuance of Commission findings, in some instances, will no longer be a compulsory prerequisite to Court action for those appealing problems they encounter with the Act. The Commission, in these cases, still could have a role in assisting complainants in their Court actions. The Commissioner, in her May, 1986 Brief believes too that there are some circumstances where direct Court action may be appropriate.

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* The June 28, 1978 Fifth Report of the Canadian Joint Standing Committee on Regulations and Other Statutory Instruments advocated that the Information Commissioner make findings within ten days (page nine). The same report notes that the United States Freedom of Information legislation imposes a 30 day time limit on the Government to answer suits under the FOI Act "unless the Court otherwise directs for good cause shown" (page nine). Some departments like Communications and the Public Service Commission in their briefs to the Parliamentary review committee suggest the Commission's findings be issued within at least six months.

Commissioners should be appointed by Parliament for five-year staggered terms on the understanding that a term could be renewed once. Assistant Commissioners shall be appointed by Parliament if the workload warrants it, but only for three year terms, renewable once.

Staffing of the Commissioner's Office should be handled by the administration of the House of Commons rather than the Treasury Board. The Commission's procedures should be published (preferably by 1986) as draft regulations under Section 77 of the Act and be subjected to a designated Parliamentary committee review and to the review of the Joint House of Commons-Senate Committee on Regulations and Other Statutory Instruments. The Commissioners should also have to appear before the designated parliamentary committee at least annually to defend their estimates and report on their ongoing activities.

In addition to their powers of mediation, the Commissioners should have the power to order the release of information. They should always seek an index of exempt records and should have the power to order a department to produce one. The Commissioners should also retain their subpoena powers and they should have the power to levy fines for information delays and denials. The power to levy fines then, should go beyond the existing Section 67 provision that calls for penalties in cases where persons obstruct the Commission from carrying out its functions under the Act.

Enforceable powers need not make a Commission less flexible, rather it should strengthen and enhance the role this office plays under the Act. There is no reason too that Commissioners with enforceable powers cannot still act as advocates. The current Commissioner emphasizes the ombudsman-like nature of her job which should remain intact.

As a final point, the Commission should be subject to the Access Act. In this way, more records currently unavailable will

likely become accessible, particularly if the departments investigated and complainant in question give their consent to releasing data.

CHAPTER II: FEDERAL COURT OF CANADA - STRENGTHENING JUDICIAL REVIEW

A. Background

Very few access cases have been the subject of Federal Court rulings and none, as yet, have set any definitive legal precedents for the release or non-release of government records. Although some observers believe that the 1984 Maislin Case limits the actions of third parties who claim commercial confidentiality, the decision did not clearly show that it is absolutely necessary to follow one type of test for confidentiality. Similarly, the 1986 case, The Information Commissioner Versus the CRTC, may be looked upon as the case that confirmed that an agency has almost absolute discretion when applying a class exemption to refuse to release records. The author prefers to argue, however, that it is too early to draw definitive conclusions from the Court decisions to date, but the CRTC decision is having an effect on restricting access. Most decisions have not deviated very far from the government's position and no real new ground has been broken in terms of opening up government records.*

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* One disturbing situation that developed during the "tunagate affair" was when a Government Minister informed the House of Commons that he could not release some requested information because the issue of information release was before the Federal Court. The information in question was the fish inspection reports of a StarKist Canada Ltd. plant and it was released a few days later in response to considerable political pressure.

It is difficult for lay people to adjust to Court filing procedures and rules, and legal arguments when pursuing a complaint. The Federal Court, however, has been more flexible and open to access users input than has the Information Commission. Unfortunately, court review is still most dependent on legal argumentation even though a thorough review of all of the background facts could help establish the justice of the user's case. It would be helpful, for example, if the courts required that agencies prepare * indexes of denied documents.* It would also be a step ahead if users could be represented at in camera hearings on exempt documents. **

According to the Information Commissioner and the Government, access users are limited in the type of access problem they can bring before the Federal Court. Problems related to time delays or fees that have been charged are supposed to be resolved at the Information Commissioner stage. The author has managed to bring these problems to the attention of the Federal Court, however, by arguing that they are forms of constructive refusal of records.

At times, the Federal Court has brought parties together before legal arguments begin in order to try and mediate the dispute. This is a positive approach and the Act would do well to make formal provisions for its more frequent use. ***

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* The author is requesting the Court order CMHC to prepare such an index in a Court case filed in May 1986 (Court file T-1019-86). The Commissioner does in some cases prepare such indexes but that data remains largely unavailable to the applicant.

** An applicant, in the author's opinion, would be unwise to agree to take part in in camera Court proceedings if such an option existed. Even if represented at in camera hearings by counsel, this may still not be very helpful if that representative could not see the exempted documents.

*** In the case, Ken Rubin versus Minister of Employment and Immigration (Court file T-194-85), Mr. Justice Jerome attempted a week before legal argumentation was to begin, to see whether myself as the Applicant or the Government as the Respondent had had a change of position regarding the need for a $5 application fee for using departmental record inventories and access procedural manuals. The Government still wanted the $5 fees and I insisted on free access to the reference aids so the attempt at mediation did not succeed.

There are several problems a user can encounter in proceeding to Court under the Access Act:

- There is no published guide of procedures that access users can follow to help them get through Section 41 Federal Court cases. The general Federal Court rules of procedure are technical and do not contain a reference index to rules likely to apply in Access Act cases.
- Court hearings do involve expenses and costs can be assigned to applicants in cases where motions fail and no new legal principle is established in relation to the Access Act. The Federal Government, that seeks costs from Access Act applicants in most Federal Court cases, could burden the user with considerable costs. *
- Court cases tend to take a long time to come up for hearing and an even longer time to reach the judgment stage.

There are also no clear ground rules regarding how users, under Section 42(2) of the Act, may participate in hearings, particularly if they want to participate after they have already agreed to let the Information Commissioner act on their behalf. **

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* This user has been fortunate to date and not had to pay Court costs. In one case (Ken Rubin versus Solicitor General (T-936-85)) I was awarded disbursement costs.

** This user, for instance, under Section 42(1) gave his consent to the Information Commissioner to pursue a time delay case against the Atomic Energy Control Board (Court file T-275-85) for their slowness in producing their Board meeting minutes. However, the motion was discontinued as the Board produced the data in question. Had the action continued, this party would have become a party under Section 42(2) since he would have had to argue for the wider release of 1975 to 1983 Board minutes as the Commission was only prepared to argue for the release of the 1980 to 1983 Board minutes.

The most frustrating and still on-going Court situation that I have been involved in, to date, has been the proceedings wherein I have had to defend my request for access to meat inspection reports. The Government did not release these reports as several meat packing companies, as the third party in the case, initiated Court actions under Section 44(1) of the Act to prove their point that the commercial data should remain confidential. As the original applicant in these cases, the onus should not be on me, after becoming a party to the meat packers' actions under Section 44(3) of the Act, to argue for release against the meat packing companies while the Government lawyers more or less sit on the sidelines. The meat packing companies who have brought the actions are Burns Meats Limited, Canada Packers Inc., Cooperative Federee de Quebec, FW Fearman Company Ltd., Gainers Inc., Intercontinental Packers Limited, and Toronto Abattoirs Ltd.

This places me in the difficult position of having to defend Government release policies which I do not entirely agree with, at a time when I do not have sufficient resources to actively pursue my case. I do not believe the Government went far enough to order full release of the meat inspection reports and I have filed a submission and motion in Court to that effect. I do not, however, have sufficient means to make several trips to Toronto as the cases proceed, to argue for the consumer interest position but plan to remain an active intervenor.

Third parties, like the meat packers, have the distinct advantage of being able to go straight to Court under Section 44 of the Act to object to the release of commercial data to access applicants. Under the existing system, however, applicants have to go to the Information Commission first in order to plead their case for access to information. Then they can proceed to Court. *

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* An applicant can appeal beyond the Federal Court-Trial Division to the Federal Court-Appeal Division, all the way to the Supreme Court of Canada. This has never happened in practice.

B. Recommendations

The Federal Court review process should be improved so that it allows for greater judicial independence from the government and provides a more accessible judicial administration for the access user.

The Scope and Power of Federal Court Review

By adopting the following suggestions related to changing the system, it should be easier to meet the first of these two objectives:

- Ensure full de novo judicial review in the Federal Court will apply to reviewing all exempt records. This would mean deleting Section 50 of the Act which calls for less than full scale judicial review for Sections 14, 15, 16(1)(c) and (d), and 18(d) of the Act
- Provide for judicial review of an agency's use of exemptions and require that specific injury tests and a public interest override test be applied to the claimed exemptions
- Provide for judicial review of cabinet confidences in Section 69
- Give explicit authority, as part of the onus of proof on government agencies, to produce indexes of exempt records (the Vaughn index) *
- Change Section 52(2) of the Act to allow parts of case hearings dealing with Section 13(1)(a) or (b) or Section 15 to be part of public court proceedings as opposed to the existing provision for holding them exclusively, in camera
- Delete Sections 44 and 51 of the Act so that third parties can no longer file Court applications
- Provide, more explicitly, the authority to allow amicus briefs from friends of the Court

* The Vaughn Index refers to the landmark American Freedom of Information Act court case (Vaughn v. Rosen 484 F 2nd 820 D.C. Circuit 1973) cert. denied 415 U.S. 977 (1974) wherein the court ordered the production of an itemized, indexed inventory of every agency record or portion thereof where exemptions had been claimed.

- Provide the authority to levy fines of up to $10,000 or to order jail sentences of up to three years for officials who are found guilty of wilfully withholding records
- Ensure that access users who are denied information are compensated for damages and court costs. *

Access Act users may make use of the Courts if they know that wide-open class exemptions are amended to include injury tests so that the Courts can independently determine what information should be exemptable. Users would also benefit from the right to sue for damages as a result of information denial. Finally, the Court's powers to order the release of documents would be considerably strengthened if government officials knew that they, along with their agencies, could be subject to penalties.

Judicial Procedural Aides

Recommendations are also needed to make the judicial procedural system more open to access users. These are:

- A user's guide on how to use the Federal Court for access cases should be prepared and issued under Section 45 of the Access Act
- There should be a formal requirement in the Act for the regular publication of the proceedings of all access Court cases **
- There should be a training course for regional Federal Court registrars on the Access Act, and applicants should have the option of receiving technical help from registrars when they file Access Act applications

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* Damages should be claimed, for example, for negligence in wrongfully withholding information of benefit to the public, for loss of health and safety, for missed publication deadlines and so on.

** Justice Canada does this informally and periodically via its newsletter Communique.

- Applicants should be required to submit written arguments when they file an application, or within 7 days of filing, and the Government should be required to submit written arguments and replies to applicants within 15 days of the application date unless the parties agree otherwise

- Federal Court Access appeal applications should be heard and ruled on within 30 days if the applicant wants an immediate ruling, unless the Court directs otherwise for valid reasons, or unless all parties agree to a longer time period

- Preliminary Court meetings should be held so that the parties can discuss procedural matters as well as consider coming to an out-of-court settlement

- A means should be established whereby the Information Commissioner could bring to the Court's attention the views and arguments of applicants not represented at in camera hearings

- A means should be established whereby the Court may assign, at no cost to the user, a public interest advocate to help those access users who do not have sufficient resources to proceed with their case

- A system should be instituted whereby access users who are not represented by counsel can be compensated for the costs involved in preparing for and attending Court cases if they win the case, or establish new access principles.

CHAPTER III: THE FORGOTTEN COMPLAINT CHANNELS

My experience has been that complaint channels other than those offered by the Information Commission and Federal Court are in some cases worth pursuing. * A welcome innovation, therefore, would be the publication of an Access Act user's guide which details the formal complaint-appeal route as well as other available channels of complaint.

One often overlooked appeal channel is the procedure of writing a responsible Minister or head of an institution to try and resolve differences of opinion. Appealing directly to the Minister of Public Works, for instance, helped the author to receive documents on the use of UFFI in federal buildings, but probably succeeded more because the matter was part of a Court action against the Minister of Public Works, (Court File T-495-85).

Another alternative complaint channel is the process of taking an access problem to the designated Section 75 parliamentary review committee; this is a particularly useful approach. The author has taken this approach by presenting to the Justice and Solicitor General Committee the problems associated with Agriculture Canada's reluctance to release as much information as it could on meat inspection reports. ** The author in this case has also become a party to Court action.

A complainant can also often strengthen his case by telling his story to the media, and by requesting help from a public interest counsel or a civil liberties or citizens' group. Working with journalists from Southam News, for example, definitely was one factor that helped the author obtain minutes from meetings of the Atomic Energy Control Board.

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* Sometimes, I have complained to the Privacy Commissioner as the more appropriate Commissioner and in one case contemplated filing a joint complaint with both Commissioners.

** Agriculture Canada documents indicate that they wish to have greater commercial protection under the Act for meat inspection reports and to change the format of the meat inspection reports so that applicants receive less information.

There is also nothing to prevent Access Act users from bringing other legal actions to the courts. This user, for instance, filed a Writ of Mandamus in Federal Court against the National Capital Commission (Court File T-217-86) because it had broken many of its promises regarding the timetable for the release of requested information. The Federal Court on a Writ of Mandamus can hear arguments and decide on urgent situations in a matter of days. The Court may not always consider cases of frustrated information denial as warranted under a Writ of Mandamus motion, however. One user issued a Writ of Mandamus against the Information Commissioner for a delay in the receipt of findings, for example, and the action was not successful. Fortunately for the author, the NCC produced the requested information after the Court action was adjourned and before the matter came up for argument.

Canadian courts are now hearing various constitutional rights cases. Individuals may choose in the future to argue cases of information denial under the Canadian Charter of Rights and Freedoms rather that following the procedures laid down in the Access Act and confining themselves to the complaint-appeal route laid down in the Access Act.

The information rights of Canadians are not restricted to the Access Act and users cannot afford to overlook all the avenues of appeal and resolution. The Access Act must make it clearer that there are a range of review appeal options available to users.

PART IV: EXTENDING THE PRINCIPLE OF OPENNESS IN GOVERNMENT

The Access Act represents Canada's first attempt at the federal level to open up government records and, as I have argued to this point, the Act needs to be improved considerably in order to achieve this goal. But, to go even further, the Government must adopt measures that go beyond accessing government records, to fully ensure that Canadians have open government.

What follows is a brief discussion of 14 measures that are designed to extend the principle of openness in government:

- A sunshine provision should be adopted to allow for open regulatory board and commission meetings.

  The 1976 United States Sunshine Act has been in effect for a decade and it has opened up many of Washington's board and commission meetings to public scrutiny. * The Act requires that verbatim transcripts of such meetings be made available to the public.

  In Canada, the meetings of federal boards and commissions are closed to the public and only summaries of these meetings are kept. These summaries are not always made available to the public, and if they are, they are often released with deletions.

- A consultative committee provision should be adopted so that government agencies can seek the independent help of panels of experts and lay people.

  Consultation committees appointed by responsible Ministers can help to make government agencies more open to the public. If they are given the right to meet independently and to publish the views of the agencies they are monitoring, then they can help improve government citizen communications.

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* The American Sunshine Act allows for proper notification of such meetings and for exempt meetings if they deal with the areas of defence, personnel, legal trade secrets, and financial plans. Common Cause, a public interest group in the United States, has stated that the 10 exemptions are too broad. It has been one of the groups protesting the informal meetings held by the Nuclear Regulatory Commission as a way of getting around the provisions of the Sunshine Act.

While the general trend in Ottawa has been to have consultative committees that lack independence, there are a few interesting models around such as the National Council of Welfare and the Economic Council of Canada. There are also some advisory councils in Ottawa but they act as Ministerial rubber-stamps with only a very small degree of independence.

- A "whistle-blowing" provision should be adopted that gives public employees who have good reason to believe that their organizations are engaged in illegal, dangerous and unethical conduct, the right to release records in good faith (after their agencies refuse to do so).

The need for protecting whistle-blowers in Canada has become important after the recent firings of an Indian Affairs official who revealed planned cut-backs in native programming, and a Deputy Registrar of the Immigration Appeals Board in Toronto who presented allegations of various problems with Board practices. The Indian Affairs official just narrowly escaped facing criminal prosecution for breach of trust under Section 111 of the Criminal Code.

The United States has "whistle-blowing" legislation contained in the 1978 U.S. Civil Service Reform Act. Some critics argue that it does not protect whistle blowers in a very effective manner and needs improving.

Section 74 of the Access Act only protects public employees from civil proceedings or from prosecution under their oaths of allegiance, when they disclose records that they are entitled to disclose under the Act.

- A strict control measure should be placed over any RCMP investigations of Access to Information users who are questioned, under Section 111 of Criminal Code provisions, about the source of a public information leak.

Government officials have expressed concern that an applicant may piece together sensitive information or apply for specific information that could only be known by insiders. In at least one case, the RCMP questioned Access Act users whose specific record requests led the investigators to believe that they had a source inside the ministry. This particular investigation was initiated by the Secretary of the Treasury Board because Treasury Board documents containing serious allegations about waste in government had been leaked to the media.

The provision of information to the RCMP about Access Act users is an alarming practice that must stop. The creation of information files on Access Act users was never intended to be used as a law enforcement tool for cross-examination purposes. All access users should be publicly identified in keeping with the spirit of openness. Their motives in applying, however, should not be questioned or be put on record via government investigators.

An "oath of service allegiance", rather than an oath of allegiance and secrecy for public employees needs to be instituted under the Public Service Employment Act, the Public Service Staff Relations Act, the Financial Administration Act, and the Access to Information Act.

The current oath of secrecy hinders public employees from carrying out the spirit of the Access Act. It also violates the freedom of speech provisions of the Canadian Charter of Rights and Freedoms. While public employees have been charged with breaches of confidence under the Criminal Code or Official Secrets Act, only a few have actually been prosecuted.

A change in oath might help change the predominantly secretive mentality in Ottawa and encourage public

employees to serve the public better and respond to information requests more eagerly.

- A policy should be adopted that allows public employees to talk openly to the media and the public about government programs.

  In the opening days of the Mulroney Government, there was an uproar about the tighter communications guidelines for public employees that were imposed on November 23, 1984. Prime Minister Mulroney stated in December 1984 that public employees could talk openly if they stuck to the facts and policy information that had already been announced by the government. But doubts remained about whether the government's guidelines were, in fact, controlling what public employees said to the media and the public.

  A revised Access Act would have to set new communications guidelines that clearly give public employees the right to discuss government programs and activities in an open manner.

- The security classification and clearance system guidelines issued by the Privy Council Office in November, 1956 and incorporated into Cabinet Directive Number 35 on December 18, 1963 should be tightened up considerably.

  The Access Act may have ended the traditional practice of stamping many documents "confidential" although the Act still makes many documents inaccessible.

  The excessive use of classifying documents secret for security purposes and requiring many employees to receive security clearances has been reviewed on several occasions. As yet, however, no new revised security classification directives have been issued although they are now long overdue.

- The Official Secrets Act should be amended to restrict its definition of a security leak.

  Legislation to reform the 1939 Official Secrets Act has not yet been introduced in Parliament. The Act gives a broad licence to agencies to deny the release of government information to access applicants. Its continued existence without restricting what it considers to be sensitive government information, remains a threat towards more open government.

- The 1982 Canada Evidence Act should be amended to bring it in line with a revised Access Act.

  The Canada Evidence Act was passed by the House of Commons at the same time as the Access Act, yet it was not made subject to a 1986 parliamentary review. Should the government adopt broader disclosure policies and restrict its definition of exempt confidences and security information, immediate changes would have to be made to the Canada Evidence Act.

- Provision should be made for funding citizen access clearinghouses to assist the public in accessing information, monitoring developments for open government, and providing public information on access matters.

  The implementation of measures that allow the ordinary citizen to directly participate in questioning the federal government requires active encouragement from citizen groups.

  A vigorous voluntary sector engaged in reviewing the government's track record on openness would be invaluable.

  Regional citizen clearinghouses run by existing or newly created citizen groups could provide the means to further stimulate an already active and questioning public.

The funding could come from private individual contributions and collected access fee payments. Government grants should not be necessary.

- Parliament should be given an expanded role in assessing and reviewing legislative measures related to open government.

  As described in Part I, a revised Access Act could create a Standing Committee on Access to Information with a broad mandate similar to the New York State legislative committee on open government matters.

- An Access to Information Centre should be created to openly develop access rules and hold hearings on methods of encouraging open government arrangements.

  This Centre could serve as a non-governmental instrument for public participation in open government rule making and its directors should appear annually as witnesses in front of the Standing Committee on Access to Information.

- A statement should be incorporated into Section ? of the Access Act to underline the concern that the promotion of openness in government and the active provision of assistance to information seekers are among the main purposes of the Act.

  This point was made in Part I; it is important enough to be re-emphasized here.

. An information access rights clause should be added to the Canadian Charter of Rights and Freedoms.

Currently, there is no direct right in the Canadian Charter of Rights and Freedoms dealing with access to government information. The Charter does have the related right of freedom of expression but it lacks a clause that would help more directly to create an environment conducive to open government and an open society.

The Access Act will die slowly as a tool for searching out information and a means for providing open government if it is perceived as being limited to the application of obtaining written records when all other information channels have failed. Its current procedures and restrictions are rigid and selective and they promote too much secrecy.

The Access Act must be improved and amended to be credible. The Act then will become a measure that gives the public basic rights to know about their government.

APPENDIX ONE - Previous and Proposed Access Research Reports

Published Reports

The reports, available for sale as publications from the author at 68 Second Avenue, Ottawa K1S 2H5, include:

Opening the Door A Crack (Vol. 1) and Cracks in the Federal Information Foundation (Vol. 2). 1983 $30.00

- a review of the 1982 Canadian Access to Information Act that examines problems with access procedures and federal information practices.

Testing the Spirit of Canada's Access to Information Act (Vol. 1 - Assessment) (Vol. 2 - Case Descriptions). 1984. $30.00

- an account of over 175 access test case experiences in the November 1982 to June 1984 period.

The Public's Right To Information Access in The Federal Government As Viewed by Cabinet Ministers, Members of Parliament and Senators. Vol. 1 and 2. 1977. $15.00

- a survey (done for the ACCESS citizen group) reviewing the information access policies of federal departments and the views of federal parliamentarians.

Promoting Freedom Of Information & Collection of Briefs and Articles 1975-84. $25.00

- articles and previous parliamentary briefs on freedom of information in the 1976-84 period.

A Review of Access Cases 1983-84. 1985. $30.00

- an analysis of information released by twenty federal agencies sponsored by the Access to Information Centre.

Suggested Changes to Canada's Access to Information Act, 1986. $30.00

- a detailed plan of action to improve Canada's access legislation.

Reports To Be Published 1986-87

Access to and Denial of Cabinet Confidences. $35.00

- describes personal experiences in obtaining accessible cabinet confidences and access cases citing cabinet confidentiality, along with proposals to restrict claims for cabinet secrecy.

Opening Up the Decision Making Deliberations of Ottawa's Commissions and Crown Corporations. $30.00

- a review of access experience with various Ottawa regulatory boards and public corporations, along with proposals for Canadian sunshine legislation.

Essays on Users of Canada's Access to Information Act. $15.00

- an examination of Access Act users that includes parliamentarians, labour, the media and public interest groups.

Summary of Personal Access Act Applications, Official Complaints and Federal Court Cases, Late 1982 - Early 1986. $10.00

- a brief description of nearly 300 Access cases filed by the author before and after the Access Act proclamation, of the some 40 complaints filed with the Information Commissioner and 8 Federal Court actions.